

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2471

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

AD-EXPRESS, INC; REX KITCHEN, as President of AD-EXPRESS, INC.; ANDREW GALLO Individually and as President of ANDY GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS VARIETY STORE; and PENNY WEBER,

Plaintiffs-Appellants,

—against—

JOHN F. KIRVIN, Supervisor of the Town of Rotterdam, New York; BENJAMIN WOLLNER, FRANCIS L. STONE, PETER LA MALFA, and WILLIAM OSTA, as members of the Town Board of the Town of Rotterdam, New York; EDWARD LONGO and JOHN LA MALFA, as Town Justices of the Town of Rotterdam, New York; and JOSEPH S. DOMINELLI, as Chief of Police of the Town of Rotterdam, New York,

Defendants-Appellees.

**On Appeal From The United States District Court
For The Northern District Of New York**

PLAINTIFFS-APPELLANTS' APPENDIX

MICHAEL VOLPE
Rotterdam Town Hall
Vinewood Avenue
Rotterdam, New York
Attorney for Defendants-Appellees

GERARD A. DUPUIS
MILLER & SUMMIT
90 Broad Street
New York, New York 10005
Attorneys for Plaintiffs-Appellants

PAGINATION AS IN ORIGINAL COPY

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APPENDIX

Docket Entries

DATE	PROCEEDINGS	Date Judgm
1974		
Oct. 24	(1) Filed civil rights complaint -Summons issued -Original-8 copies	
" 24	Application for TRO. Defendants' attorney consents to signing of TRO. Plaintiff to post \$1,000.00 bond. Motion for preliminary injunction to be heard Oct. 7. Plaintiff and defendant to file memo by Oct. 3, 1974	
" 24	(2) Filed Order to Show Cause for preliminary injunction and order granting stay	
" 24	(3) " bond for undertaking for injunction	
" 25	Summons delivered to Marshal for service	
Oct. 4	(4) Filed memorandum of law of plaintiff	
Oct. 8	(5) Filed summons served on all parties	
Oct. 7	Motion for Preliminary Injunction. Decision Reserved. TRO continued. Two weeks to file and exchange further briefs	
t. 23	(6) Filed Plaintiff's Memorandum of Law	
t. 23	(7) Filed Plaintiff's Supplemental Attorney's Affidavit	
" 29	(8) " Ordinance Information	
Nov. 6	(9) " Memorandum-Decision and Order denying motion for preliminary and dismissing complaint. Temporary Restraining Order is vacated as November 12, 1974 at 2:00 p.m.-SO ORDERED-HON. JAMES T. FOLEY, USDI	
" 6	(10) Filed judgment	
" 6	Mailed cards re judgment to Rosenblum and Leventhal, and Michael J. Vol	
" 8	(11) Filed Motion for Injunction pending appeal	
" 8	(12) Filed Notice of Appeal	
" 9	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.	

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE;
and PENNY WEBER,

Plaintiffs,

Civil Action No.

-against-

74-CV-401

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

NOTICE OF APPEAL

Defendants.

SIRS:

PLEASE TAKE NOTICE, that the plaintiffs hereby appeal to
the United States Court of Appeals for the Second Circuit from
the memorandum decision and order of the United States District
Court for the Northern District of New York dated November 5,
1974 and signed by the Honorable James T. Foley, United States
District Judge, entered and docketed in the office of the Clerk
of the United States District Court for the Northern District
of New York on November 6, 1974, denying the plaintiffs' appli-

cation for preliminary equitable relief and dismissing plaintiffs' complaint herein, and the plaintiffs hereby appeal from each and every part of the said memorandum decision and order as well as from the whole thereof.

Dated: November 8, 1974

Yours, etc.,

5/ Paul R. Kietzman
for ROSENBLUM & LEVENTHAL
Attorneys for Plaintiffs-Appellants
732 Madison Avenue
Albany, New York 12208

TO: MICHAEL VOLPE, Esq.
Town Attorney for the
Town of Rotterdam
Rotterdam Town Hall
Vinewood Avenue
Rotterdam, New York

Clerk of the United States
District Court for the
Northern District of New York
United States Post Office
and Courthouse
Utica, New York

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
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of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

COMPLAINT FOR
DECLARATION AND
INJUNCTIVE RELIEF

Defendants.

I. JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28, United States Code, sections 1331 (a), 1343 and 2201, et. seq., this suit being authorized by Title 42, United States Code, section 1983. This is an action for declaratory judgment and appropriate equitable relief to prevent further deprivation under color of state law, statute or ordinance, of rights, privileges and immunities, secured to plaintiffs by the Constitution and Statutes of the United States, including the right to freedom of speech and of the press under the First and Fourteenth Amendments

to the Constitution of the United States and the right to equal protection under the law and due process of law under the Fourteenth Amendment to the Constitution of the United States, and under Title 42, United States Code, section 1983.

II. PARTIES PLAINTIFF

2. AD-EXPRESS, INC., is a business corporation duly formed and existing under and by virtue of the laws of the State of New York, with an office and principal place of business in the Town of Colonie, County of Albany and State of New York. AD-EXPRESS, INC. is engaged in business as a private postal delivery service, primarily handling second and third class matter as a saturation medium within the Counties of Albany, Rensselaer, Schenectady and Saratoga, State of New York.

3. REX KITCHEN is a citizen of the United States of America and a resident of the Town of Delmar, County of Albany, State of New York, and is the President, part owner and one of the managing officers and employees of AD-EXPRESS, INC., which provides his principal means of support.

4. ANDREW GALLO is a citizen of the United States of America and a resident of the Town of Rotterdam, County of Schenectady and State of New York, and is the President, part owner and managing officer and employee of ANDY GALLO CONSTRUCTION CORP., doing business under the name and style of 4 SEASONS

VARIETY STORE at number 2621 Guilderland Avenue, in the Town of Rotterdam, New York. Mr. GALLO's store deals principally in lawn and garden equipment, power tools, hand tools, cookware, housewares, paint and general hardware, and said business constitutes and provides his livelihood.

5. PENNY WEBER is a citizen of the United States of America and a resident of the Town of Rotterdam, County of Schenectady, and State of New York. Mrs. WEBER, as an independent contractor, performs deliveries for AD-EXPRESS, INC. on four routes in the Town of Rotterdam, New York.

III. PARTIES DEFENDANT

6. JOHN F. KIRVIN is the duly elected Supervisor of the Town of Rotterdam, New York. He is sued herein in said official capacity.

7. BENJAMIN WOLLNER, FRANCIS L. STONE, PETER LA MALFA and WILLIAM OSTA are members of the Town Board of the Town of Rotterdam, the duly constituted legislative body of said municipality. They are sued herein in said official capacity.

8. EDWARD LONGO and JOHN LA MALFA are the duly elected Town Justices of the Town of Rotterdam, New York. They are sued herein in said official capacity.

9. JOSEPH S. DOMINELLI is the Chief of Police of the Town of Rotterdam, New York. He is sued herein in said official capacity.

IV. INCIDENTS AT ISSUE

10. As alleged hereinbefore, AD-EXPRESS, INC., is a private postal system which handles and delivers primarily second and third class matter to individual homes and dwelling units in the Counties of Albany, Schenectady, Rensselaer and parts of Saratoga. The deliveries are made primarily by housewives and other like persons, acting as independent contractors, throughout each and every dwelling unit in the areas served.

11. AD-EXPRESS, INC. provides these services to a wide spectrum of customers including large retail stores distributing commercial advertising circulars, smaller businessmen distributing advertising matter, churches publicizing religious, social and fund-raising activities, public officials circulating newsletters to their constituents, small newspapers, college classes circulating public service messages, and various charitable organizations soliciting for membership, funds or public attention and support.

12. AD-EXPRESS, INC. provides these services at far lower rates than those charged by the United States Postal Service and local newspapers. In many cases small business people are asked to pay only what they can for a distribution. In many other cases the distribution has been made without charge for religious, charitable and political organizations and their representatives.

13. AD-EXPRESS, INC.'s continued existence depends entirely

on its ability to provide "saturation" delivery within its marketing area, which includes the Town of Rotterdam. AD-EXPRESS, INC.'s major commercial clients, including Montgomery-Ward, Two Guys, K-Mart, Sears Roebuck and Co. and Shoprite Supermarkets, rely upon AD-EXPRESS, INC.'s present ability to deliver throughout the entire market area, including the Town of Rotterdam.

14. Plaintiff KITCHEN has been duly informed by the aforesaid major commercial clients of AD-EXPRESS, INC. that if AD-EXPRESS, INC. were unable to deliver in one or more of the municipalities within said marketing area said clients would be forced to discontinue AD-EXPRESS, INC.'s services and revert to newspaper or direct mail distribution methods.

15. Should these said major commercial clients of AD-EXPRESS, INC. withdraw their business AD-EXPRESS, INC. would be rendered immediately insolvent and forced out of business.

16. As hereinabove set forth, AD-EXPRESS, INC. contracts with a large number of private individuals, principally housewives, to make deliveries of materials consigned to AD-EXPRESS, INC. for home delivery by its clients, along designated routes within the said market area on one or more designated days per week. Said deliveries are made by placing the materials to be delivered in small plastic bags and hanging said bags from the front doorknob of each dwelling unit within a designated delivery

route. In some instances the bags are fastened by twist ties to mail box posts or suspended from hooks thereon.

17. If an individual wishes to permanently stop or suspend deliveries of such materials to his dwelling place he need only telephone the offices of AD-EXPRESS, INC. and so request. If the deliveries are to be permanently stopped, AD-EXPRESS, INC. requests that the caller complete and return a brief form for AD-EXPRESS, INC.'s records. If the individual declines to fill out such a form deliveries are nevertheless stopped forthwith. Temporary suspension of deliveries is in all cases effectuated by a mere phone call.

18. On or about the 22nd day of August, 1974, the defendant members of the Town Board of the Town of Rotterdam, pursuant to the powers vested in it by the Town Law of the State of New York, § 130 et. seq., enacted a certain Local Law No. 13 of the year 1974, entitled "A Local Law Prohibiting the Distribution of Unsolicited Advertising Materials in the Town of Rotterdam." A copy of this ordinance is annexed hereto as "Exhibit A."

19. This aforesaid ordinance, by its terms, prohibits the distribution of "advertising material or samples" to any home within the Town of Rotterdam without the written consent of the occupant of such home. By its terms a person or corporation which violates this ordinance will be deemed guilty of a criminal offense and subjected to a fine of \$50.00 for the first offense and \$100.00 for any subsequent offense.

20. Further, by its terms, the ordinance is inapplicable to the United States Postal Service, newspapers of general circulation, and charitable and non-profit organizations.

21. To plaintiffs' knowledge this ordinance has already been enforced by defendants against one sub-contractor making deliveries of materials in the Town of Rotterdam, and against a supervisory employee of AD-EXPRESS, INC. making deliveries of materials in the Town of Rotterdam. These cases are still pending in Justice Court of the Town of Rotterdam.

22. Upon information and belief, based upon telephonic and personal conversations with defendants and with MICHAEL VOLPE, Esq., Town Attorney for the Town of Rotterdam, defendants intend to enforce said ordinance against any person making deliveries for AD-EXPRESS, INC. within the Town of Rotterdam, against any employee of AD-EXPRESS, INC. supervising such deliveries, and against AD-EXPRESS, INC. itself. All of these persons and plaintiff corporations will then be subjected to the statutory penalties for such violations as well as the additional deprivations of Constitutional rights, privileges and immunities and other damages alleged hereinafter.

23. As to plaintiff AD-EXPRESS, INC., this said ordinance, unless its enforcement be enjoined by this Court, will subject plaintiff to substantial financial losses, loss of other valuable property rights, and deprivation of its Constitutional rights in the following respects:

(a) Plaintiff will be put out of business by virtue of the removal from it of the business of its major commercial clients, all without due process of law, causing grievous financial loss and loss of substantial property rights to some four hundred individuals within its marketing area who contract individually with plaintiff to make home deliveries of AD-EXPRESS, INC. materials, all in violation of the rights conferred upon it by the Fifth and Fourteenth Amendments to the United States Constitution.

(b) The ordinance denies plaintiff equal protection under the law, in that it excepts from its ambit any advertising matter delivered by agents of the United States Postal Service, by newspapers of general circulation, or by charitable or non-profit organizations. No reason for such a statutory distinction exists which bears any reasonable relationship to the actual and constitutionally permissible objectives of this ordinance.

(c) The ordinance as drawn is impermissibly broad and vague in that it fails to define the term "advertising materials" with sufficient precision to permit plaintiff to formulate and adjust its lawful business conduct so as to avoid the statutory sanctions imposed. Furthermore said statute is broader in its sweep than reasonably necessary to accomplish the actual and constitutionally permissible objectives advanced in support of its passage, in that by its literal terms it prohibits the distri-

bution by plaintiffs of printed matter entitled to full First Amendment protections.

24. As to plaintiff PEX KITCHEN, this said ordinance, unless its enforcement be enjoined by this Court, will subject plaintiff to immediate and substantial financial losses, loss of other valuable property rights, and deprivation of his Constitutional rights in the following respects:

(a) Plaintiff will be put out of business, suffer loss of means of support, and lose a very substantial capital investment in said business, all without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

(b) Incidental to his loss of business and means of support plaintiff will be further deprived of his rights under the First and Fourteenth Amendments to the United States Constitution to utilize the facilities of AD-EXPRESS, INC. to espouse and advance the political, charitable, social, religious and other like causes of his choice, and to participate, as he has in the past, in the exercise of free political debate and discussion of religious and social issues. Further, his exercise of the foregoing rights will be impermissibly chilled and curtailed by forcing him to utilize the expensive media of newspaper or the United States Postal Service in the furtherance of those rights.

(c) The ordinance denies plaintiff equal protection

under the law, in that it excepts from its ambit any advertising matter delivered by agents of the United States Postal Service, by newspapers of general circulation, or by charitable or non-profit organizations. No reason for such a statutory distinction exists which bears any reasonable relationship to the actual and constitutionally permissible objectives of this ordinance.

(d) The ordinance as drawn is impermissible, broad and vague in that it fails to define the term "advertising materials" with sufficient precision to permit plaintiff to formulate and adjust his lawful business conduct so as to avoid the statutory sanctions imposed. Furthermore, said statute is broader in its sweep than reasonably necessary to accomplish the actual and constitutionally permissible objectives advanced in support of its passage, in that by its literal terms it prohibits the distribution by plaintiff of printed matter entitled to full First Amendment protections.

25. As to plaintiff ANDREW GALLO, this said ordinance, unless its enforcement be enjoined by this Court, will subject plaintiff to immediate and substantial financial losses, including the cancellation of existing contractual rights and obligations as to the distribution of advertising materials and consequential loss of income and sales, and deprivation of his constitutional rights in the following respects:

(a) Plaintiff will suffer loss of means of support and other valuable contractual and property rights, all without

due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

(b) The ordinance denies plaintiff equal protection under the law, in that it excepts from its ambit any advertising matter delivered by agents of the United States Postal Service, by newspapers of general circulation, or by charitable or non-profit organizations. No reason for such a statutory distinction exists which bears any reasonable relationship to the actual and constitutionally permissible objectives of this ordinance.

26. As to plaintiff PENNY WEBER, this said ordinance, unless its enforcement be enjoined by this Court, will subject plaintiff to immediate and substantial financial loss, including loss of her means of support and that of her family, deprivation of her Constitutional rights, and criminal sanctions and penalties, in the following respects:

(a) Plaintiff will suffer loss of means of support and other valuable contractual and property rights, all without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

(b) The ordinance denies plaintiff equal protection under the law, in that it excepts from its ambit any advertising matter delivered by agents of the United States Postal Service, by newspapers of general circulation, or by charitable or non-profit organizations. No reason for such a statutory distinction exists which bears any reasonable relationship to the actual and constitutionally permissible objectives of this ordinance.

(a) The ordinance as drawn is impermissibly broad and vague in that it fails to define the term "advertising materials" with sufficient precision to permit plaintiff to formulate and adjust her lawful business conduct so as to avoid the statutory sanctions imposed. Furthermore, said statute is broader in its sweep than reasonably necessary to accomplish the actual and constitutionally permissible objectives advanced in support of its passage, in that by its literal terms it prohibits the distribution by plaintiff of printed matter entitled to full First Amendment protections.

IV. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

1. A temporary restraining order, restraining the defendants and anyone acting in concert with them, from instituting any further administrative, civil or criminal proceedings against any of the plaintiffs to enforce the provisions of the Town of Rotterdam's Local Law No. 13 for the year 1974, and from taking any other steps intended to have or having the effect of enforcing said provisions.

2. A preliminary and a permanent injunction each enjoining the defendants, their successors in office, and anyone acting in concert with them, from instituting any further administrative, civil or criminal proceedings against any of the plaintiffs

to enforce the provisions of the Town of Rotterdam's Local Law No. 13 for the year 1974, and from taking any other steps intended to have or having the effect of enforcing said provisions.

3. A judgment declaring the Town of Rotterdam's Local Law No. 13 for the year 1974 unconstitutional and void.

4. Such further relief as the Court deems just and proper.

Respectfully submitted,

15/ Paul R. Kietzman
Paul R. Kietzman
for ROSENBLUM AND LEVENTHAL
Attorneys for Plaintiffs
Office and P.O. Address
732 Madison Avenue
Albany, New York 12208
Telephone: (518) 463-1107

A 17a

EXHIBIT A, ANNEXED TO COMPLAINT

Not Reproducible

STATE OF NEW YORK)
COUNTY OF ALBANY) SS.:

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney of record for AD-EXPRESS, INC. in the within action; that deponent has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by plaintiff AD-EXPRESS, INC. is that plaintiff is without the County of Albany.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

/s/ Paul R. Kietzman
for ROSENBLUM & LEVENTHAL

STATE OF NEW YORK)
COUNTY OF ALBANY) SS.:

REX KITCHEN, being duly sworn, deposes and says that deponent is the President of AD-EXPRESS, INC., the corporation named in the within action; that deponent has read the foregoing complaint and knows the contents thereof, and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because AD-EXPRESS, Inc. is a domestic corporation. Deponent is an officer thereof, to-wit, its President.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: Familiarity with the business operations of AD-EXPRESS, INC. and its records.

/s/ Rex D. Kitchen

Sworn to before me this
23 day of September, 1974

/s/ Paul R. Kietzman
Notary Public, State of New York

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) SS.:

ANDREW GALLO being duly sworn, deposes and says that deponent is the President of ANDY GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS VARIETY STORE, the corporation named in the within action; that deponent has read the foregoing complaint and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because ANDY GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS VARIETY STORE, is a domestic corporation. Deponent is an officer thereof, to-wit, its president.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

/s/ Andrew Gallo
Andrew Gallo

Sworn to before me this
21 day of September, 1974

/s/ Susan A. Condon
Notary Public, State of New York
Qualified in Albany County
My Com. exp. 3/30/75

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) SS.:

ANDREW GALLO, being duly sworn, deposes and says that deponent is a plaintiff in the within action; that deponent has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

_____/s/ Andrew Gallo

Sworn to before me this
21 day of September, 1974

Notary Public, State of New York
Qualified in Albany County
My Com, ex. 3/30/75

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) SS.:

PENNY WEBER, being duly sworn, deposes and says that deponent is a plaintiff in the within action; that deponent has read the foregoing complaint and knows the contents thereof, that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

_____/s/ Penny Weber

Sworn to before me this
21 day of September, 1974

/s/ Susan A. Condon
Notary Public, State of New York
Qualified in Albany Co.
My Com, exp. 3/30/75

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE;
and PENNY WEBER,

Plaintiffs,

Civil Action No.

-against-

74-cv-401

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

ORDER TO SHOW CAUSE
FOR PRELIMINARY
INJUNCTION AND ORDER
GRANTING STAY (TEM-
PORARY RESTRAINING
ORDER)

Defendants.

This cause coming on for hearing upon the application of
plaintiffs for an order to show cause for a preliminary injunc-
tion as prayed for in the complaint, and it appearing from the
affidavits of PAUL R. KIETZMAN, Esq., REX KITCHEN, ANDREW GALLO,
PENNY WEBER, and JOHN L. SCHMITT, attached to and incorporated
in said application, that plaintiffs are entitled to such relief
unless good cause to the contrary be shown, it is hereby

ORDERED that the defendants and each of them be and appear
before HON. JAMES T. FOLEY, a Judge of this Court, in the Federal
Courthouse, Broadway, Albany, New York, on the 7th day of
October, 1974 at the hour of 10:00 o'clock A.M., and
there and then show cause, if any there be, why this Court should
not issue a preliminary injunction as prayed for in said complaint,
and it is further

ORDERED that pending a hearing on the above order to show cause, that defendants and those acting in concert with them are stayed and restrained from instituting criminal or civil proceedings against any of the plaintiffs to enforce the provisions of the Town of Rotterdam's Local Law No. 13 for the year 1974, and from taking any other steps intended to or having the effect of enforcing said provisions, and it is further

ORDERED, that plaintiffs shall post a security bond of \$ 1,000.00, pursuant to Rule 65 of the Federal Rules of Civil Procedure, and it is further

ORDERED that this temporary restraining order may be served by any person over the age of eighteen years selected for that purpose by the plaintiffs' attorneys upon the named defendants, or their attorneys, and such service shall be deemed good and effective.

Dated: _____ o'clock
September 24, 1974.

S/ James T. Foley
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as President
of AD-EXPRESS, INC.; ANDREW GALLO,
Individually and as President of ANDY
GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS
VARIETY STORE; and PENNY WEBER,

Plaintiffs

-against-

Civil Action

No. 74-CV-401

Motion for Temporary
Restraining Order
and Preliminary
Injunction

JOHN F. KIRVIN, Supervisor of the Town of
Rotterdam, New York; BENJAMIN WOLLNER,
FRANCIS L. STONE, PETER LA MALFA, and
WILLIAM OSTA, as Members of the Town
Board of the Town of Rotterdam, New York;
EDWARD LONGO and JOHN LA MALFA, as Town
Justices of the Town of Rotterdam, New
York; and JOSEPH S. DOMINELLI, as Chief
of Police of the Town of Rotterdam,
New York,

Defendants

Upon the verified complaint herein and the affidavit
of PAUL R. KIETZMAN, ESQ., sworn to the 24 day of September,
1974, the affidavit of REX KITCHEN, sworn to the 23 day of
September, 1974, the affidavit of ANDREW GALLO, sworn to the 21
day of September, 1974, the affidavit of PENNY WEBER, sworn to
the 21 day of September, 1974, the affidavit of JOHN L.
SCHMITT, sworn to the 23 day of September, 1974, all annexed
thereto, the plaintiffs move this Court as follows:

1. To issue a temporary restraining order, restraining
the defendants and anyone acting in concert with them, from
instituting any further administrative, civil or criminal
proceedings against any of the plaintiffs to enforce the
provisions of the Town of Rotterdam's Local Law No. 13 of the
year 1974, entitled "A Local Law Prohibiting the Distribution

of Unsolicited Advertising Materials in the Town of Rotterdam", and from taking any other steps intended to have or having the effect of enforcing said provisions, pending the hearing upon the issuance of the preliminary injunction sought hereinafter in this motion and the determination thereof.

Notice of this application has been given to the defendants and their attorneys in the following manner: On Friday, September 20, 1974, PAUL R. KIETZMAN, ESQ., an attorney associated with the law firm of ROSENBLUM & LEVENTHAL, attorneys for plaintiffs herein, spoke by telephone with the following persons: JOHN F. KIRVIN, Supervisor of the Town of Rotterdam; BENJAMIN WOLLNER, FRANCIS L. STONE, PETER LA MALFA and WILLIAM OSTIA, Members of the Town Board of the Town of Rotterdam; EDWARD LONGO and JOHN LA MALFA, Town Justices of the Town of Rotterdam; JOSEPH S. DOMINELLI, Chief of Police of the Town of Rotterdam; and MICHAEL VOLPE, Town Attorney for the Town of Rotterdam. All of these persons were given notice of the pendency of this action and that the instant application for preliminary equitable relief will be heard before the HON. *James T. Foley*, United States District Judge, on September 23, 1974, at 11:00 o'clock a.m. in the chambers located in the United States Post Office and Courthouse, *Albany*, New York. Additionally, copies of plaintiffs' moving papers were served upon the said MICHAEL VOLPE, ESQ., on September 24, 1974, on behalf of all defendants.

2. To issue a preliminary injunction enjoining the defendants, their successors in office, and anyone acting in concert with them, from instituting further administrative, civil or criminal proceedings against any of the plaintiffs to enforce the provisions of the aforesaid Town of Rotterdam's Local Law No. 13 for the year 1974, and from taking any other steps intended to have or having the effect of enforcing said ordinance, pending the final hearing and determination of this cause.

The grounds of this motion as more fully set forth in the verified complaint and the annexed affidavits, are that:

(a) The said Town of Rotterdam's Local Law No. 13 for the year 1974 is patently unconstitutional and void, in that it impermissibly inhibits and restricts plaintiffs from exercising their First Amendment rights to freedom of speech, press and religion, impinges upon plaintiffs' business of distributing printed matter at least some of which is entitled to First Amendment protections, denies plaintiffs due process of law by virtue of its overbreadth and vagueness, deprives plaintiffs of their property without due process of law, and denies plaintiffs their right to equal protection under the law, all secured to plaintiffs by virtue of the provisions of the Constitution of the United States.

(b) Unless restrained and enjoined, the defendants will enforce the provisions of said ordinance against

plaintiffs and others similarly situated, thus subjecting them to loss of earnings, loss of employment, the loss of other valuable property rights, and criminal prosecution and penalties. The plaintiff, AD-EXPRESS, INC., will be put out of business immediately and some 400 independent contractors will lose the benefit of their relationship with plaintiff, AD-EXPRESS, INC. Additionally, plaintiffs, ANDREW GALLO and will be immediately and permanently deprived of valuable contractual and other property rights. Their access to the services of AD-EXPRESS, INC. will be permanently removed. Plaintiff, PENNY WEBER, will be deprived of her source of income immediately and permanently. Plaintiff, REX KITCHEN, will lose his livelihood and a substantial capital investment in AD-EXPRESS, INC. Plaintiff, AD-EXPRESS, INC. will immediately lose major commercial clients, particularly those who advertise perishable items by means of its services, which will render it impossible for AD-EXPRESS, INC. to continue in business. Furthermore, if the Town of Rotterdam is permitted to enforce the instant ordinance, other localities in the area will immediately pass or enforce similar ordinances.

3. There is a substantial probability of the success of the instant action.

4. No injury or detriment to either defendants or the public at large will be sustained through the issuance of a

temporary restraining order and/or a preliminary injunction.

Dated: September 24, 1974.

/s/ Paul R. Kietzman

PAUL R. KIETZMAN
for ROSENBLUM & LEVENTHAL
Attorneys for Plaintiffs
Office & P. O. Address
732 Madison Avenue
Albany, New York 12208
Telephone: 518-463-1107

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE;
and PENNY WEBER,

Plaintiffs,

Civil Action No.

-against-

74-CV-401

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

ATTORNEY'S AFFI-
DAVIT IN SUPPORT
OF PLAINTIFF'S
MOTION FOR PRE-
LIMINARY EQUITA-
BLE RELIEF

Defendants.

STATE OF NEW YORK)
COUNTY OF ALBANY) SS.:

PAUL R. KIETZMAN, Esq., being duly sworn, deposes and says:

1. I am an attorney associated with the firm of ROSENBLUM
and LEVENTHAL, Esqs., attorneys for the plaintiffs in the above-
styled cause. I make this affidavit in support of plaintiff's
claim that immediate and irreparable injury will befall plain-
tiffs if the temporary restraining order and preliminary injunc-
tion prayed for in this cause are not granted.

2. As set forth in the affidavit of REX KITCHEN submitted
in support of the instant application at least two persons have
already been arrested and charged with violations of the Town
of Rotterdam's Local Law No. 13 for the year 1974. Numerous

telephone conversations have taken place between your deponent's office and various officials of the Town of Rotterdam in an effort to obtain some voluntary suspension of enforcement of this ordinance pending a resolution of the legal and constitutional issues posed thereby. No such voluntary suspension has been agreed to, and, in fact, your deponent's firm has been assured by MICHAEL VOLPE, Esq., Town Attorney for the Town of Rotterdam, that this ordinance will, in the future, be enforced fully upon any complaint received and upon any police observation of the proscribed conduct.

3. As more fully set forth in the affidavit of PENNY WEBER, the existence of this ordinance and police surveillance and enforcement thereof, will in the very near future, if not enjoined, cause plaintiff WEBER and many others similarly situated to be deprived of their livelihood or, alternatively, to risk criminal prosecution and further financial penalties.

4. Under the threat of criminal prosecution, upon information and belief, plaintiff AD-EXPRESS, INC. will, in the immediate future lose all their carriers in the Town of Rotterdam and be unable to replace them with new personnel.

5. Compounding this aspect of the problem is the fact that similar legislation is pending in the Towns of Colonie and North Greenbush. Upon information and belief the Colonie ordinance has been tabled pending the outcome of the instant application for preliminary equitable relief. Deponent has likewise had conversations with JOHN TELISKA, Esq., Town Attorney for the Town of North Greenbush, concerning that town's proposed ordinance. It is deponent's understanding from these conversations that

passage of the North Greenbush ordinance is also being withheld pending the outcome of this application.

6. Furthermore, during the coming week public hearings are scheduled in the City of Schenectady and the Town of Niskayuna concerning similar legislation. Clearly, if the controversy between these parties is not preserved by means of the preliminary equitable relief requested herein the plaintiffs will be inundated with litigation in a wide variety of local forums almost immediately.

7. Literal compliance with the ordinance would be wholly economically infeasible, and would likewise put AD-EXPRESS, INC. out of business as a result of the greatly increased need for manpower, time and the like. This is particularly true when it is considered that AD-EXPRESS, INC.'s major competitors, the United States Postal Service and the local newspapers are unaffected by the ordinance.

8. As pointed out in the complaint in the action and the supporting papers submitted herewith, AD-EXPRESS, INC.'s business depends wholly upon its continuing ability to provide saturation coverage of its marketing area on a dependable weekly or twice weekly basis. AD-EXPRESS, INC.'s major commercial clients, its lifeblood, will not and, indeed, cannot afford to await the outcome of this litigation before deciding whether and through whom to distribute its advertising messages. Without a restraining order and injunction this action will be mooted by the demise of the principle plaintiff.

9. As set forth more fully in the affidavit of REX KITCHEN annexed hereto, the harm, if any, to defendants, caused by the issuance of the relief requested herein is negligible.

10. It would appear from deponent's research on the law governing this matter that there is no probability of a state court opinion which might either "narrow" or declare ultra vires this ordinance. Facing a similar challenge to a local ordinance the New York Court of Appeals in People v. Bohnke, 287 N.Y. 154, upheld the validity of the statute. More recently a lower court in People v. Walkenhorst, 59 M.2d 563, did likewise citing the continuing viability of Bohnke, supra.

11. The Court may also wish to note that prior to any state court determination of these issues the plaintiff AD-EXPRESS INC. would surely be put out of business inasmuch as CPLR § 6313 (a) forbids the issuance of a temporary restraining order against a public officer or municipal corporation "to restrain the performance of statutory duties."

12. Thus, since it is within the Court's sound discretion to take jurisdiction in this matter and to grant the preliminary equitable relief herein prayed for, your deponent submits that by reason of the foregoing and the grounds set forth in the accompanying affidavits and moving papers, this Court should find such jurisdiction and grant the relief herein prayed for.

13. Plaintiffs have chosen this forum as the ablest and

most fitting arbiter of the important and fundamental questions of the violation of their constitutional rights by the challenged ordinance. Since these rights arise under the federal Constitution and statutes and have been previously vindicated and recognized in Federal Courts. (See Toms River Publishing Company v. Brielle, PS [U.S.D.C.-N.J.] March 1, 1974.) A copy of the Toms River Publishing Company decision is annexed hereto.

14. The Toms River case, supra, involved a plaintiff which published what was, arguably, a newspaper distributed free of charge to all the residents of the Borough of Brielle, New Jersey. A statute forbidding the distribution of such matter was declared unconstitutional and void.

15. The criterion applied therein was, deponent submits, the proper one governing this situation: that in order for the statute to withstand plaintiff's first amendment challenge, it must appear that the statutory means is directly related to a compelling state interest and that this compelling interest is served directly by the statute with no unnecessary encroachment upon First Amendment rights. As more fully demonstrated by the complaint and additional affidavits submitted herewith this statute can withstand no such scrutiny. The statutory goals are indirectly, if at all, served and the beneficial effects, if any, rendered nugatory by the irrational and arbitrary exceptions thereto.

16. As pointed out in the affidavit of REX KITCHEN, the plaintiff AD-EXPRESS, INC. is widely and regularly involved in the distribution of matter which is fully entitled to First Amendment protection. Nor does it matter that AD-EXPRESS, INC. has, upon occasion been paid fees for such distributions. As the Supreme Court pointed out in Breard v. Alexandria, 341 U.S. 622, the fact that protected matter is sold or distributed for a fee has no bearing upon its status as protected matter nor upon the rights of its authors, publishers, or distributors.

17. It may also be argued that since it is not alleged that plaintiffs have distributed protected matter in the Town of Rotterdam that they lack standing to raise such an argument (or that the hypothesized argument does not present a justiciable controversy.) Suffice it to say that the business and operations of AD-EXPRESS, INC. are not severable and that if its commercial activities are foreclosed in Rotterdam, all of its distribution activities elsewhere will be ended. Furthermore, as the Supreme Court stated in NAACP v. Button, 371 U.S. 415, 432, "Where first amendment questions are at issue persons who engage in non-privileged conduct are not precluded from attacking a statute under which they are threatened with conviction."

18. Clearly the plaintiffs challenge here involved not only some hypothesized infringement of their rights by defendants but very real issues involving material identical to that which

AD-EXPRESS, INC. has already widely distributed in this area.

19. It is obvious that virtually all of the privileged material distributed by AD-EXPRESS, INC. (copies of which are annexed as exhibits to the affidavit of REX KITCHEN) are "advertising materials" within the literal terms of the Town of Rotterdam's Local Law No. 13 for the year 1974. Equally obviously this material is entitled to First Amendment protection. The anomalous quality of the statute is thus apparent: AD-EXPRESS, INC. is forbidden to distribute this matter in Rotterdam. Newspaper distributors and postal employees are free to distribute any advertising matter of any sort without restraint. Charitable and non-profit organizations are evidently free to distribute not only their own solicitations, but any other form of advertising which a commercial advertiser might annex thereto. AD-EXPRESS, INC. could not distribute solicitations for Big Brothers of Albany, but Big Brothers of Albany would be quite free to distribute a Montgomery Ward circular in a container with their own message on it.

20. Assuming arguendo, that the purposes for which the statute was passed are valid, the ordinance does little or nothing to serve these purposes. Any possible beneficial effect of the statute is entirely undercut by its anomalous classifications and exceptions to its provisions.

21. Even if this Court should feel compelled to discount

or disregard the First Amendment questions presented herein, the equal protection clause to the Fourteenth Amendment yet requires that a statutory classification such as is here challenged must bear some "rational relationship to a permissible state objective." Village of Belle Terre v. Boraas, 39 L. Ed. 2d 797, citing Reed v. Reed, 404 U.S. 71, 76. It is submitted that this ordinance cannot hope to pass this judicial scrutiny either.

22. The issues of safety and child labor are chimerical as pointed out in the annexed affidavits. The question of security of homes is ill-served, if at all, by the ordinance since newspapers and junk mail will continue to pile up at the doorsteps of vacationing homeowners whether or not AD-EXPRESS, INC. is permitted to distribute.

23. Finally, apart from the fact that homeowners are amply protected from trespassers by criminal statutes of statewide applicability as well as common law tort remedies, the trespass involved is extremely minimal and of a variety commonly practiced daily by numerous persons left untouched by the Town of Rotterdam ordinance.

24. Most of the decisions in this area of the law have involved either door-to-door solicitations by persons who seek direct conversation and/or business transactions with the occupant of a dwelling. (See, for example, Breard v. Alexandria,

supra; and Martin V. Struthers, 319 U.S. 141) or the delivery door-to-door of a single published periodical or newspaper. (See, Toms River Publishing Company v. Brielle, supra; and Van Nuys Publishing Co. v. City of Thousand Oaks, 5 Cal. 3d 817, 489, P.2d 809, cert. den., 405 U.S. 1042.)

25. The situation presented by this action is perhaps more analogous to the facts in Rowan v. United States Post Office Department, 397 U.S. 728. The constitutional right therein asserted was the right to communicate by mail with other persons. In the course of its reasoning the Supreme Court had occasion to ponder the degree of consideration to be given "obscene" speech, which has consistently been held outside the protection of the First Amendment. In many respects obscene speech receives the same shrift from the courts as what has sometimes been referred to as "commercial speech", which label might arguably be fastened to much of what AD-EXPRESS, INC. distributes. See, Valentine v. Chrestenson, 316 U.S. 52.

26. The Supreme Court in Rowan upheld the challenged statute but its rationale is instructive in this situation. In balancing the right of the plaintiff to communicate by mail against the right of privacy of the addressee the Court found that although the sender had the right to send unsolicited matter the addressee has the concomitant right to cut off the flow in his own discretion. The Court appeared to reason that this power

of "censorship" was rightly and appropriately vested in the discretion of the private citizen himself, and that such an arrangement averted constitutional infringements by the government.

(397 U.S. at 737.)

27. The Court's strong suggestion here is that, where the rights of individuals are to be balanced using such imprecise factors as the distinction between "obscene" and protected speech or "commercial" and protected speech, the legislative oversteps its bounds when it substitutes its own judgment for that of the individual recipient of this matter as to its desirability.

28. Finally, it is submitted that, as the Court in Toms River, supra, found all of the permissible statutory objectives advanced in support of this ordinance either already are or can be accomplished by more precise and narrowly drawn statutes without impinging upon the constitutional rights of plaintiffs and others similarly situated.

29. Therefore, it is submitted by your deponent that plaintiffs have shown a strong likelihood of success on the merits and that the "balance of hardships" tips decidedly in their favor, and that thus the prerequisites for a temporary

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restraining order and for preliminary injunctive relief have been sufficiently established.

/s/ Paul R. Kietzman
Paul R. Kietzman

Sworn to before me this
24 day of September, 1974.

/s/ Susan A. Condon
Notary Public, State of New York
Commissioned in Albany County.
My Commission expires 3/30/75.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TOMS RIVER PUBLISHING COMPANY,
A Corporation of the State of
New Jersey,

Civil Action
No. 985-73

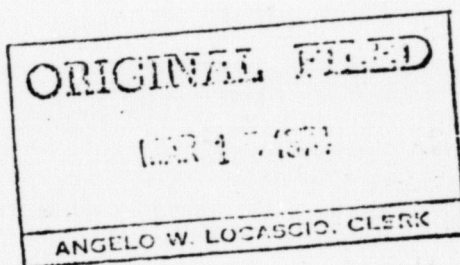
Plaintiff

OPINION

vs.

THE BOROUGH OF BRIELLE,
Monmouth County, New Jersey,
et al.

Defendants



APPEARANCES:

ROTHSTEIN, MANDELL & STROHM, ESQS.,
By: Peter R. Strohm, Esq.,
Attorneys for the Plaintiff

CARTON, NARY, WITT & ARVANITIS, ESQS.,
By: Henry E. Kordes, Esq.,
Attorneys for the Defendants

FISHER, District Judge

In this matter plaintiff seeks injunctive relief and a
declaratory judgment that Ordinance No. 446¹ of the Municipal
Code of the Borough of Brielle, New Jersey, violates plaintiff's
First Amendment right to freedom of the press. At a hearing
subsequent to the issuance of a temporary restraining order

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1. The ordinance is entitled, "An Ordinance to Establish Regulations for the Depositing of Literature on Private Residential Property and in Public Places in the Borough of Brielle and to Provide Penalties for the Violation Thereof."

plaintiff's request for a preliminary injunction was denied. Jurisdiction is found in 28 U.S.C. Sections 1331 and 1343. The Court finds that assuming arguendo at least one of the public interests alleged to be protected by the ordinance in question is paramount or compelling in nature, the municipality has not demonstrated that the means chosen is necessary to the accomplishment of the goal sought to be achieved. Therefore, the impact of this ordinance on plaintiff's right to freedom of the press is unnecessary and the ordinance is invalid.

Toms River Publishing Company publishes and circulates in Ocean and Monmouth Counties a newspaper entitled "The Reporter". The paper is distributed free of charge to all residents of Brielle by local children. The children deposit the paper at or near the front door of each residence and commercial establishment.

On March 26, 1973 the Mayor and Council of Brielle adopted Ordinance No. 446 which provides in pertinent part:

WHEREAS, the Mayor and Council of the Borough of Brielle have determined that the unauthorized depositing of literature on private residential property and in public places creates an unsanitary and unsightly condition in the Borough and constitutes a potential hazard to the health, safety and welfare of the residents thereof; and

WHEREAS, the Mayor and Council have further determined that the unauthorized depositing of literature on private residential property creates a serious police problem in that the accumulation of such literature acts as an advertisement to the criminally inclined that the property is unoccupied ...

* * *

2. Violations. It shall be a violation of this Ordinance for any person to:

a. Distribute, cast, throw or otherwise place any newspaper, magazine, hand bill, pamphlet, circular, dodger or any other paper of a commercial nature or otherwise, on any Private Residential Property within the Borough of Brielle without the express consent of the owner or an adult occupant of such Private Residential Property

Plaintiff asserts that subsequent to the adoption of this Ordinance, the Borough's Police Department threatened plaintiff's carriers in an effort to halt distribution of the paper and initiated municipal court proceedings against two of plaintiff's agents. As a result of this conduct plaintiff claims that it is becoming increasingly difficult to retain carriers or to employ new ones. Furthermore, strict compliance with the ordinance would be so costly as to jeopardize the existence of the free newspaper with the concomitant result of denying the public a source of news.

Plaintiff's contention is that Ordinance No. 446

constitutes an unconstitutional abridgment of plaintiff's right to freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiff alleges that the ordinance cannot withstand close scrutiny because it is inartfully drawn and fails to accomplish its purpose without unduly limiting First Amendment rights. This is a basic "overbreadth" argument.

Defendant contends that the Ordinance is a legitimate exercise of the Borough's police power and that any infringement of plaintiff's right to freedom of the press is incidental and is outweighed by the interest of the community in preventing both littering and the open invitation to burglary presented by an accumulation of weekly newspapers on the premises of an unoccupied dwelling. Furthermore, and notwithstanding its absence from the preamble to the Ordinance, defendant contends an additional reason for the passage of this Ordinance was to protect the right to privacy of the citizenry of the Borough of Brielle. Defendant relies heavily on this right to privacy and urges this Court to rule that this interest in the right to privacy greatly outweighs plaintiff's right to freedom of the press.

It is clear that the First Amendment right to freedom of speech and press is broad in scope and encompasses the right to

distribute literature. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). It is also clear that governmental action that has an adverse impact on First Amendment rights must be justified by a public interest that is "compelling" or "paramount". Branzburg v. Hayes, 403 U.S. 665, 680 (1972). Furthermore, a law enacted pursuant to such interest and which has an adverse impact on First Amendment rights "bears a heavy burden of justification ... and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964). As the Court in Branzburg stated: "(J)ustificable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." Branzburg v. Hayes, *supra*, at 680-81. See Cameron v. Johnson, 390 U.S. 611, 616-17 (1968).

Using these criteria this Court must determine whether Ordinance No. 446 is a reasonable exercise of Brielle's police power in protecting the health, safety, morals, and general welfare of its residents; or, whether it is so far-reaching that it goes beyond the public need for protection at the expense of plaintiff's right to freely publish and distribute the news.

Considering first whether the public interest vindicated by Ordinance No. 446 is "compelling" or "paramount" in nature, the Court is confronted with three grounds on which this Ordinance rests: (1) Prevention of litter, (2) protection of citizens' right to privacy, and (3) prevention of crime. The community no doubt has an interest in preventing the littering of its streets, parks, and residential areas. However, the Supreme Court in Schneider v. New Jersey, 308 U.S. 147, 162 (1939), specifically rejected this argument as a valid public interest justifying an ordinance that infringed First Amendment rights. This Court also recognizes that there is a valid interest in protecting the privacy of the Borough's citizens; however, where the violation of that right to privacy is de minimis an infringement of any First Amendment right is unjustified. See Breard v. City of Alexandria, 341 U.S. 622 (1951).

The Court is left with the "prevention of crime" rationale as a justification for this Ordinance. It is a recognized duty of a municipality to do everything within its power to protect its citizens from criminal acts. This can be considered a "compelling" or "paramount" public interest, however, the Court's inquiry is not concluded by that determination.

It is the obligation of this Court to scrutinize the Ordinance to determine whether the means adopted by the Ordinance are necessary to the prevention of crime. Inherent in this determination must be an analysis of the breadth of the Ordinance and a consideration whether the interest in preventing crime may be accomplished by an alternative method which has less of an impact on First Amendment rights than Ordinance No. 446.

In Lovell v. City of Griffin, supra, the Court was faced with an ordinance that prohibited the distribution of all literature, at all times, by any means, without first obtaining permission from the city manager. The ordinance was held unconstitutional because it required permission prior to distribution and because it was so broad in its sweep - not limiting the prohibited literature to that which was obscene, offensive to public morals, or advocating unlawful conduct, nor did it limit the type of distribution proscribed.

Ordinance No. 446, although not identical to the Lovell ordinance, is similar in nature. The Ordinance here under consideration has no regard for the type of literature to be distributed by nature or content, but by its language prohibits the unauthorized dissemination of "any newspaper, magazine, hand bill, pamphlet ... or any other paper of a commercial nature or

otherwise ...".² Furthermore, with the possible exceptions of hand-to-hand delivery and paper pick-up points, it prohibits all forms of distribution. It matters not whether the content is religious, political, social, or commercial in nature, or whether the literature is distributed on a daily, weekly, or one time basis. Presumably, this would prohibit distribution of political leaflets in advance of local, state and national elections without first having obtained permission from each owner or adult occupant of Borough residences.

The impact on First Amendment rights caused by the overbreadth of this Ordinance is unnecessary. A more narrowly drawn alternative enactment could accomplish the same result as Ordinance No. 446 - preventing the accumulation of unsolicited literature on unoccupied premises - without the adverse effect on protected rights caused by Ordinance No. 446. See, e.g., Van Nuys Publishing Co. v. City of Thousand Oaks, 5 Cal. 3d 817, 489 P.2d 809, 97 Cal. Rptr. 777 (1971), cert. denied, 405 U.S.

2. In correspondence with the Court following oral argument defendants intimate that the definition of "The Reporter" as a newspaper is questionable. However, it is the opinion of the Court that the publication has a sufficient percentage of news content to qualify as such. See N.J.S.A. 35:1-2.1 and 1-2.2.

1042 (1972), (ordinance prohibiting distributor from delivering literature to occupant who objects to distribution is acceptable).

See also Rowan v. Post Office Department, 397 U.S. 728 (1970) (upheld a federal statute allowing addressee unreviewable discretion to decide whether he wishes to receive further material from a particular sender).

An additional alternative available to the municipality would appear to be in the form of the traditional trespass statute noted by the Supreme Court in Martin v. City of Struthers, 319 U.S. 141 (1943). In Martin the Court recognized that the law punishes persons who trespass on the property of another after having been warned by the owner to keep off and that such a regulation should leave that decision where it belongs - with the homeowner. Id. at 147. "A city can punish those who call at a home in defiance of the previously expressed will of the occupant" Id. at 148.

For the foregoing reasons this Court holds that Ordinance No. 446 of the Borough of Brielle impermissably infringes plaintiff's First Amendment rights to freedom of speech and press. The Ordinance, therefore, is unconstitutional and defendants are

enjoined from further enforcement of its provisions.

Submit an order.

Dated: March 15, 1974. -

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as President
of AD-EXPRESS, INC.; ANDREW GALLO,
Individually and as President of ANDY
GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS
VARIETY STORE; and PENNY WEBER,

Plaintiffs

-against-

Civil Action
No. 74-CV-401

Affidavit

JOHN F. KIRVIN, Supervisor of the Town of
Rotterdam, New York; BENJAMIN WOLLNER,
FRANCIS L. STONE, PETER LA MALFA, and
WILLIAM OSTA, as Members of the Town
Board of the Town of Rotterdam, New York;
EDWARD LONGO and JOHN LA MALFA, as Town
Justices of the Town of Rotterdam, New
York; and JOSEPH S. DOMINELLI, as Chief
of Police of the Town of Rotterdam,
New York,

Defendants

STATE OF NEW YORK)
COUNTY OF ALBANY) SS.:

REX KITCHEN, being duly sworn, deposes and says:

1. I am one of the plaintiffs above-named, and I am
the President of plaintiff, AD-EXPRESS, INC., as well as its
managing employee and a major stockholder in said corporation.
I am, therefore, fully familiar with all of the facts and
circumstances of the above-styled cause.

2. AD-EXPRESS, INC., is a private postal delivery
service, serving the Counties of Albany, Schenectady, Rensselaer
and parts of Saratoga. AD-EXPRESS, INC. delivers material which
consists primarily of what would be third and second class
matter if delivered by the United States Postal Service.

AD-EXPRESS, INC. makes these deliveries at roughly 60% of the rate presently charged by the Post Office. Our customers and clients have found our service to be considerably more reliable than the United States Postal Service, since by regulation third class matter may be delivered when and if the local postmaster decides to do so in his sole discretion. Our deliveries are made on designated delivery days upon which the customer can rely. Furthermore, our service is vastly cheaper and more thorough than that provided by the local newspapers which had previously serviced many of our large customers.

3. Among our large commercial clients are Montgomery Ward, Shop-Rite, Grand Union Co., S. S. Kresge, Two Guys, Pantry Pride, Almart, Convenient Food Markets, Jamesway, W. T. Grants, Big "N", and Sears. This business has been difficult to develop notwithstanding our low rates. The low rates are possible because our profit margin depends wholly upon regular business from our major commercial clients. In turn our clients rely upon us and utilize us in large part due to our "saturation" coverage of the area. This means that every home in our marketing area is reached by independent delivery persons, typically housewives.

4. Another major factor which has heretofore made our business economically feasible, and our service desirable to our clients is that they can depend upon us for complete

and regular delivery on our designated delivery date. This is particularly vital where the customer seeks to advertise a "sale" for a brief designated time or where the customer must order food stuffs or other perishable merchandise in reliance upon response to his message from those who receive his advertising.

5. In conversations with agents of our aforesaid major commercial clients, it has been made quite clear to me by each of them that if we are prevented from delivering in Rotterdam that they will immediately begin to look elsewhere for delivery of their advertising.

6. Furthermore, the Town of Colonia has passed a similar ordinance and is, upon information and belief, awaiting the outcome of this application to the Court before enforcing said ordinance. As more fully appears in the annexed attorney's affidavit, the Town of North Greenbush is also studying a similar ordinance. Presentation of this ordinance to the Town Board of North Greenbush is also being withheld pending the outcome of this application.

7. As noted in the complaint herein, AD-EXPRESS, INC. presently contracts with some 400 delivery personnel in the marketing area to make individual home deliveries on a weekly or twice weekly basis. These carriers are paid nearly \$350,000.00 per year. The payroll of AD-EXPRESS, INC.'s employees runs to nearly \$150,000.00 per year.

8. These delivery personnel have been threatened, abused and harassed almost since the inception of our business by Post Office employees whose union is strongly opposed to our business. Presently a great number of our carriers, particularly in Rotterdam, have expressed extreme apprehension and reluctance to continue their deliveries in view of existing or pending local ordinances in local communities. As set forth in the complaint herein, two persons connected with AD-EXPRESS, INC. have already been arrested and charged in Rotterdam with violations of the subject ordinance. I am assured by defendants and other Town of Rotterdam officials that such arrests will continue on an accelerated basis if deliveries are made in the Town of Rotterdam on September 23, and 24, 1974, as presently scheduled.

9. I am informed by AD-EXPRESS, INC.'s supervisory personnel in Rotterdam that the majority of delivery personnel in Rotterdam will refuse to make deliveries unless this Court grants the preliminary equitable relief requested herein. If AD-EXPRESS, INC. loses a week or more of deliveries or permanently loses such delivery personnel, it will immediately lose some or all of its major commercial clients and thus be forced out of business permanently.

10. In addition to its major commercial clients, AD-EXPRESS, INC. has also made deliveries either for free or for a nominal fee for a number of non-commercial organizations or

persons of matter which is entitled to full First Amendment protections, as follows:

(a) On July 16, 1974, AD-EXPRESS, INC. delivered a newsletter for the Southern Saratoga "Y" without charge. A copy is annexed hereto as "Exhibit 1".

(b) On June 25, 1974, July 2 and 9, 1974, AD-EXPRESS, INC. delivered certain materials for BIG BROTHERS-BIG SISTERS OF ALBANY COUNTY, INC., as a donation to that organization. Samples of these materials are annexed as "Exhibit 2" and "Exhibit 3".

(c) On July 23, 1974, AD-EXPRESS, INC. delivered a flyer for a summer study class at the State University of New York at Albany studying child abuse at no charge. A copy of this flyer is annexed as "Exhibit 4".

(d) On July 8, 1974, AD-EXPRESS, INC. offered AD-EXPRESS, INC.'s services to the Town of Charleton JC's at a nominal cost. A copy of the letter by which this offer was made is annexed as "Exhibit 5".

(e) AD-EXPRESS, INC. has also donated several thousand plain plastic bags to the United Presbyterian Church of Niskayuna for use in the church's own distribution.

(f) In November of 1974, AD-EXPRESS, INC. will, if still in business, deliver a flyer on sight conservation on behalf of the Lions Club of Scotia without charge.

(g) On September 3, 1974, AD-EXPRESS, INC. delivered a leaflet for Christ Community Church for a nominal charge. A copy of this leaflet is annexed as "Exhibit 6".

(h) On May 23, 1974, AD-EXPRESS, INC. delivered a leaflet for Clifton Park Recreation (Chamber of Commerce) for a nominal charge. A copy of this leaflet is annexed as "Exhibit 7".

(i) On July 23, 1974, AD-EXPRESS, INC. delivered a newsletter for Albany County Legislator, James E. Buckley for a nominal charge. A copy of this newsletter is annexed as "Exhibit 8".

11. Ad-EXPRESS, INC. also serves a number of small commercial clients who pay nominal fees for the distribution of advertising which they would not otherwise be able to afford to distribute by any means.

12. Finally, AD-EXPRESS, INC. also distributes a small local newspaper, the Commercial News, which contains a large proportion of news and editorial matter. This paper serves the Southerntier of Saratoga County. AD-EXPRESS, INC. has agreements to begin distributing other similar small newspapers in the future, if it is permitted to remain in business.

13. Obviously, if AD-EXPRESS, INC. is forced out of business by the loss of its major commercial customers and a large number of its distribution personnel, it will be unable to serve its smaller customers as well.

14. I personally stand to lose my livelihood as well as a large capital investment if AD-EXPRESS, INC. is forced out of business. It also appears that I may personally be subjected to the fines and penalties imposed by the subject Town of Rotterdam ordinance under its literal terms.

15. By contract with the very real and imminent threat of loss of property rights and constitutional rights to AD-EXPRESS, INC.; myself, our carriers and customers, neither the defendants nor the public at large face any real threat of harm posed by a brief temporary restraining order and/or preliminary injunction issued during the pendency of this action.

16. During the public hearings and debate on this ordinance several purposes were advanced by defendants and others for the necessity of such ordinance. These reasons are reflected in a newspaper account of these proceedings annexed as "Exhibit 9".

17. According to the article, defendant, KIRVIN, first cited "security of residences" as a rationale for the ordinance. The term, as understood by deponent, refers to the supposed

propensity of burglars to victimize a house where advertising material accumulates, an indication that the occupants are absent. Whether or not there is a basis in truth for this supposition, and whether or not this has been the actual experience of any resident of the Town of Rotterdam, the ordinance itself is a very inefficient prophylactic measure, in that the identical problem posed by accumulations of newspapers and "junk mail" are left untouched by the statute.

18. This rationale further ignores the policy of AD-EXPRESS, INC. to interrupt or discontinue delivery permanently upon the telephone request of the occupant of a dwelling unit. A copy of the form which AD-EXPRESS, INC. requests the occupant to fill out is annexed as "Exhibit 10". As of the date of this affidavit, a mere 98 person in the entire delivery area have called and requested that deliveries be discontinued. Of these persons, only 45 filled out the forms. In the remaining cases delivery was stopped by the phone call alone.

19. Defendant, KIRVIN, also cites "delivery by children" as a reason for the statute. Delivery of newspapers and the like by children is already regulated and proscribed to some extent by the Labor Law, a statute of state-wide applicability. In reality, the great majority of delivery personnel consist of adult housewives and some college students.

In any event this ordinance is plainly an extremely indirect and inefficient vehicle for accomplishing this objective.

20. Defendant, KIRVIN, also cites the right of homeowners to be free from deliveries accomplished by "unlawful trespass" as necessitating this ordinance. In response to this rationale deponent would first point out that in most cases the actual encroachment, if any, by delivery personnel is minimal. Secondly, apart from the existing criminal trespass statutes of state-wide applicability, the matter of trespass to the property has always been regarded as a private wrong to the individual property owner, the remedy usually being conditioned upon the existence of certain circumstances including a prior instruction or warning to the trespasser by the property owner. Finally, the trespass, where it exists, is in no case greater than that which takes place daily by many other persons, including the mailman.

21. The fourth reason advanced by defendant, KIRVIN, for the necessity of the ordinance is the safety hazard allegedly posed by the plastic delivery bags. Unlike defendants who evidently had no empirical data before them at the time the ordinance was passed, plaintiff, AD-EXPRESS, INC. looked into the potential safety hazard before ordering the delivery bags. The bags used by AD-EXPRESS, INC. are 8-3/4 inches wide at the opening giving them a circumference of 17-1/2 inches or 38.5

centimeters. According to medical data obtained by AD-EXPRESS, INC. the average circumference of a three-year old girl's head is 45 centimeters, and that of a three-year old boy is 54 centimeters.

22. It has appeared to your deponent throughout the legislative proceedings prior to passage of the Rotterdam ordinance that the Town Board was responding more to the hue and cry raised by the letter carriers union who feel their jobs or salaries threatened by AD-EXPRESS, INC., than to any legitimate sentiment of the general public. The Rotterdam Town Board appears to have wholly disregarded a petition signed by some 800 householders of the Town opposing the ordinance.

23. Illustrative of the influence of the unions in the matter are two newspaper articles annexed as "Exhibits 11" and "12". In the first, Mayor Ducl of Schenectady is quoted as having been obliged to distribute his own campaign literature door-to-door in part due to the prohibitive cost of mailing. In the second article appearing a few days later the Mayor is quoted as having decided, after conferring with Mr. MASSORONI and Mr. LEGERE of the Schenectady Letter Carriers Union, that this sort of thing must stop forthwith.

24. It thus appears to deponent that little or no real threat of harm to defendants or the general public would be

posed by the preliminary equitable relief herein requested.

25. As stated hereinbefore, the plaintiffs will suffer immediate and irreversible harm if the preliminary equitable relief herein requested is denied and the final outcome of the instant litigation will be rendered meaningless to plaintiffs.

s/ Rex Kitchen
Rex Kitchen

Sworn to before me this
23 day of September, 1974.


s/ Paul R. Ketzman
Notary Public, State of New York
Qualified in Albany County
My Com. Exp. 3/30/76 .

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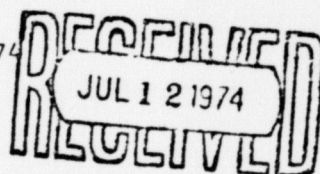
Exhibit 1, Annexed to Affidavit of Rex Kitchen

[PHOTOSTAT]

(Opposite) 

JUL 16 1974

June 24, 1974



Dear Family "Y" Member and Friends of the "Y"

At this time, your Board of Directors wants to thank everyone who worked and participated in our first season. We have more than 400 members who can take part in our program.

During the past season, we have made some mistakes; but from them we are sure to develop a stronger Family "Y". We were amateurs working in a professional undertaking.

Mark Lewis, our Director, wants to thank Bill Allen, the office manager, Sue Goodman, Mary Jean Tedrow, Ida Zaferes and Bob Wright who gave endless hours at the evening rush.

Jim Folmsbee and his helpers - Cheryl George, Larry Gray, Don Croteau and Mary Stodgell worked wonders with our gymnastic enthusiasts. Our gymnastics team competed in the Adirondack District Gymnastics Championship.

George Dempsey, Aquatic Director with the assistance of Pat Bishko, Jill Goodman, Carol Dash and Bob Dash worked with more than 100 swimmers. We graduated our first life saving class.

Shirley Schofield not only instructed our first slymnastics class but gave so much of her time and self in our special services program for handicapped children. A special "Thank-you" to Shirley and to her many assistants.

Of course, we cannot forget the biddy basketball league and all the fathers who spent Saturday afternoons preparing Shenendehowa 1980 championship team.

Norma Hancock, arts and crafts instructor, produced clever work from such young hands.

If we missed anyone, please forgive; but THANK YOU!

We are closed for the summer but our staff is still working on plans for next year. A bigger and better program will start on September 16. Watch for our August newsletter which will have a tentative schedule of activities for fall.

On July 20 we are having an all day picnic for members and their families and friends at Kaydeross Park, Saratoga Lake. An old fashioned picnic is planned with fun and games for everyone. FREE PARKING! Bring your own picnic lunch. Also, for only \$2.85 per person unlimited rides from 1pm-5pm and swimming from 10am - 6pm.

See you at the picnic, who knows - YOU may be the lucky winner of our drawing for a 4 day holiday for 2 in Sunny Paradise Island, Nassau, The Bahamas or \$400.00 cash. The grand prize is great and the only way we can expand our much needed program is with your support. The drawing will take place at the picnic.

For tickets call Suzie Fitzpatrick at 371-2451.

Thank you for your support and interest.

Sincerely,
Family "Y" Board of Directors

AWARDS WILL BE GIVEN

PROSPECTIVE MEMBERS ARE WELCOME TO GET PREVIEW OF NEW FALL PROGRAM

EXHIBIT 1

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62a

Exhibits 2 and 3, Annexed to Affidavit of Rex Kitchen

[PHOTOSTATS]

(Opposite) 

**WE NEED
YOU**

**BIG
BROTHERS**

Please call for further information

463-4429

MUSIC . . .

MUSIC . . .

MUSIC .

FRIDAY,

JULY 19

RECEIVED
JUL 1 1974

. . . for the

KIDS

SAKE!!

JUL 2 1974

...cocktails and tidbits

(siema college 6-8 pm, free light buffet, dutch drinks)

Tom Jones

(colonie coliseum, 8:30 performance)

...midnight dancing

RESERVATIONS ONLY
by JULY 10 PLEASE

(during cocktails and post concert at siema)

Cocktail Party @ \$5.00
TOM JONES @ \$6.25
PACKAGE @ \$10.00

FRIDAY * * * * * JULY 19

Light Buffet & Cocktail Party \$ 5.00
TOM JONES 8.25
Dance 3.00

TOTAL AMOUNT ENCLOSED \$

USUAL SELLING PRICE \$16.25/person

Telephone 463-4429

BIG BROTHERS
Big Brothers — Big Sisters
of Albany County, Inc.
194 Washington Avenue
Albany, New York 12210

Name _____
Address _____
City _____
State _____ Zip _____

Sale Price 10⁰⁰ person

. . . and it's TAX DEDUCTIBLE too!!

EXHIBIT 3

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63a

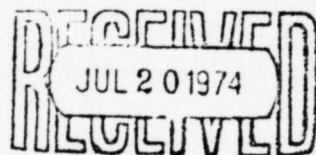
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Exhibit 4, Annexed to Affidavit of Rex Kitchen

[PHOTOSTAT]

(Opposite) 



PROTECT ABUSED CHILDREN

CALL THIS TOLL-FREE NUMBER

1-800-342-3720

THIS NUMBER IS OPEN TO THE PUBLIC 24 HOURS A DAY.

CALLS MAY BE MADE ANONYMOUSLY!

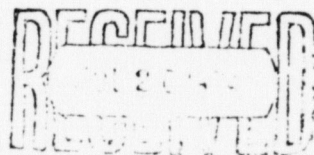


EXHIBIT 4



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**Exhibit 5, Annexed to Affidavit of Rex Kitchen
and Attachments Thereto**

[PHOTOSTATS]

(Opposite) 

express

10 Commercial Road, Albany, New York 12205
Telephone: (518) 438-8451

m July 8, 1974

Mr. Steve Lawrence
Secretary
Charleton J. C.'s
R. D. # 3, Stage Road
Ballston Lake, New York 12019

Dear Sir:

This is to confirm our conversation of July 3, 1974, in which I offered, on behalf of Ad Express, Inc., to provide occasional distributions to citizens of Charleton, on behalf of community oriented projects at nominal cost.

It is our pleasure to assist communities and community oriented agencies which are striving to upgrade the quality of life in our service area.

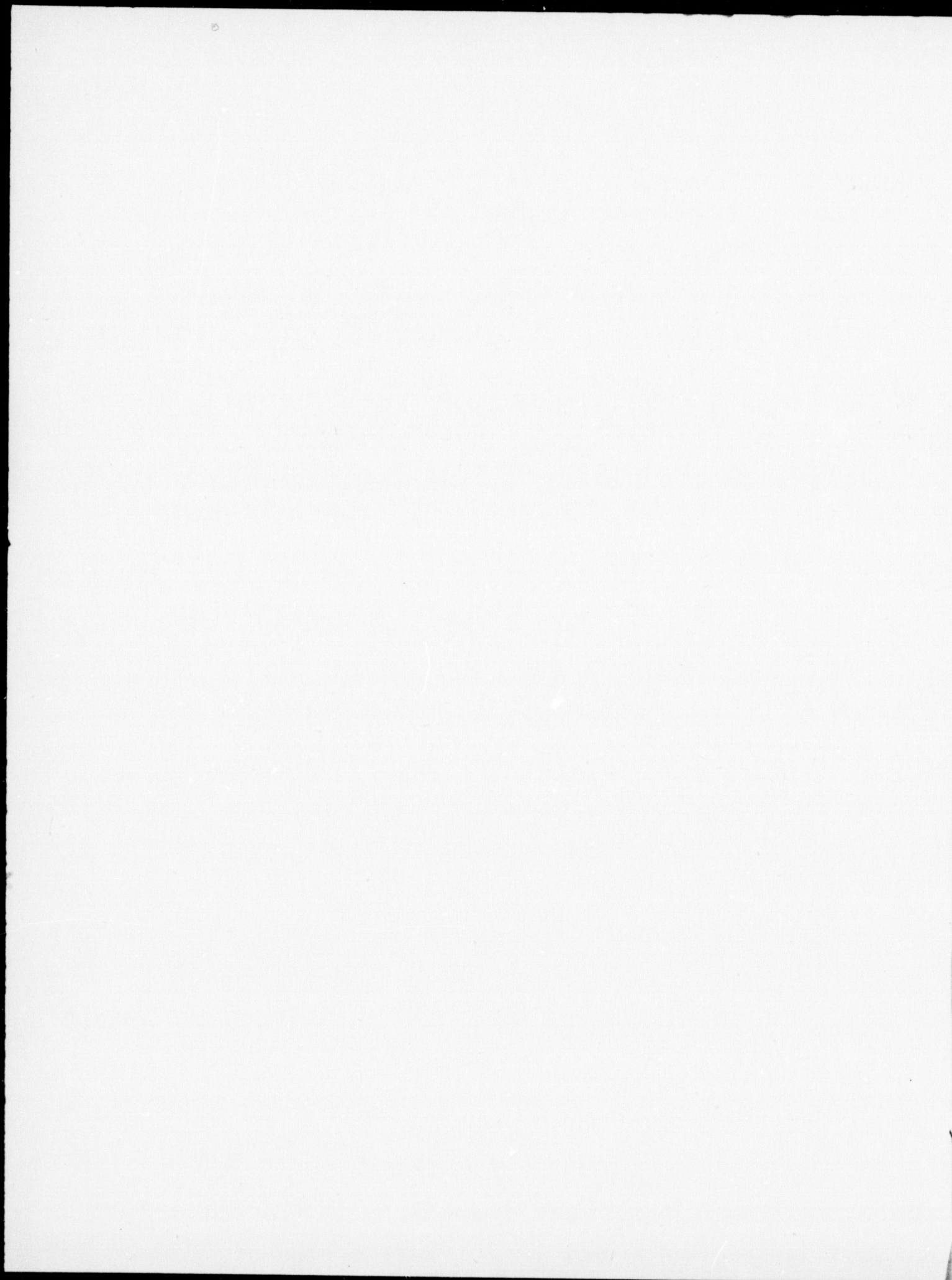
We look forward to working with you.

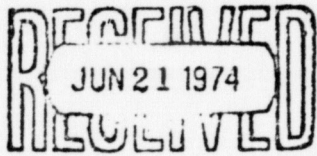
Sincerely,

Eric H. Kraus
Director

EHK/am1

EXHIBIT 5





JUN 24 1974

Hi NEIGHBOR!!

STARTING JULY 15, 16, A NEW SHOPPERS GUIDE
NEWSPAPER WILL BE PERSONALLY DELIVERED TO YOUR
HOME EVERY WEEK.

THE "DELMAR DOLLAR SAVER" WILL FEATURE MONEY
SAVING VALUES FROM MANY OF YOUR FAVORITE STORES.
ADDITIONALLY, IT WILL FEATURE A FINE CLASSIFIED
SECTION, THE PERFECT WAY TO SELL THAT OLD LAWN
MOWER, OR TO ANNOUNCE A GARAGE SALE.

RATES - 10¢ PER WORD - \$1.00 MINIMUM
Please enclose payment.

FILL OUT, DETACH AND MAIL THE HANDY COUPON BELOW

TO: DELMAR DOLLAR SAVER
P.O. BOX 231
DELMAR, NY 12054

Dates to run _____ Classification _____
Name _____
Address _____
_____ Phone _____

Your Ad _____

000643

To:

Schenectady County, NY

P. O. Box 91

Albany, New York 12205

Shipped To:

DATE

7-12-74

CUSTOMER'S ORDER

SALESMAN

TERMS

Net 7-15-74

P.O.B.

SHIPPED VIA

Circular Distribution of 7-16-74

7,500 Circulars @ \$10.00 H

75 00

Payable 30 days prior to delivery to:

AA Express, Inc.

10 Commercial Avenue

Albany, New York 12205

RECEIVED BY AA EXPRESS, INC. 7-12-74

Reconfirm:

75734

INVOICE

000000

Brothers of Liberty, 2nd

135 Washington Avenue

NEW YORK 12020

DATE:

201-73

CUSTOMER'S ORDER

SALESMAN

TERMS

Page - 762-74

F.O.B.

SHIPPED VIA

Circular Distribution of 7-2-74

49.000-5751350 (3) \$50.00 H

2000-01

Available 24 hours prior to delivery to:

At Exposed, Inc.

10 Commercial Avenue

Albany, New York 12205

COLLECTION BY AN INDIVIDUAL, ETC.

INVOICE

Be

000625

Big Brothers of Albany, Inc.

155 Washington Avenue

Albany, New York 12210

Shipped to

DATE

CUSTOMER'S

SALE

TERMS

Net 7-2-75

F.O.B.

SHIPPED VIA

Distribution of 7-9-75

100,000 Bags @ \$12.50 H

3000 00

Payable 24 hours prior to delivery to:

Ad Express, Inc.

120 Commercial Avenue

Albany, New York 12205

Shipment by Ad Express, Inc.

INVOICE

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Exhibit 6, Annexed to Affidavit of Rex Kitchen

[PHOTOSTAT]

(Opposite) 

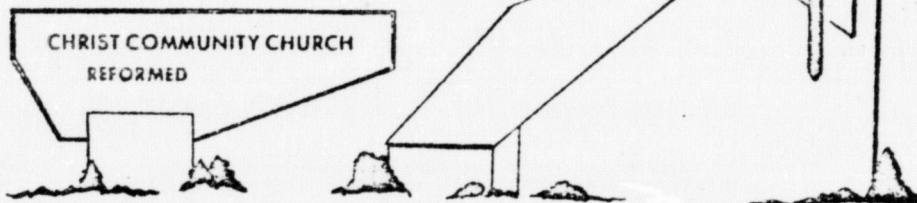
LOOKING FOR

RECEIVED
AUG 30 1974

- CHRISTIAN FELLOWSHIP ?
- A GOOD SUNDAY SCHOOL PROGRAM ?
- AN INTERESTING CONGREGATION ?

PLAN TO ATTEND

OPEN HOUSE COMMUNITY SUNDAY



ACROSS FROM WOODLAND HILLS (IN CALICO COLONY)

**JOIN US - SUNDAY SEPT. 8, 1974
AT 10:00 A.M.**

**FOR - OPEN WORSHIP SERVICE
& COFFEE HOUR**

COME AND SEE WHAT'S INSIDE

**"COMMUNITY"
IS OUR MIDDLE NAME!**

Exhibit 6



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Exhibit 7, Annexed to Affidavit of Rex Kitchen

[PHOTOSTATS]

(Opposite) 

Date

July '3

July 1

July 1

July 1

July 1

July 2

July 2

July 3

August

August

August

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Mail

MIDDLE SCHOOL

Special Events

Date	Event	Depart/Return	Price
July 3	NYC Ballet; "Nutcracker Suite"	1:30/5:30 p.m.	\$1.50
July 10	Roller Skating Party	9:30/12:30 p.m.	Swim fee
July 11	Thacher Park	9:00/3:00 p.m.	
July 17	Time Town	9:00/1:00 p.m.	
July 18	Kaydeross Park	9:00/3:00 p.m.	2.25
July 24	Fort Wm. Henry	9:00/1:00 p.m.	2.00
July 25	Howe Caverns	9:00/3:00 p.m.	4.00
July 31	Mets vs. Pirates	9:00/9:00 p.m.	13.00**
August 1	Gaslight Village	1:00/6:00 p.m.	5.00**
August 7	Yankees vs. Orioles	9:00/ 9:00 p.m.	13.00**
August 8	Kaydeross Park	9:00/ 3:00 p.m.	2.25

*includes swimming and rides

**includes charter bus costs and box seats at Shea Stadium (numbers limited)

***includes all rides

Note: You may register for the above on registration night: June 5 or by mail by using the coupon below. Please mail checks no later than June 5.

Special Events Registration

Name _____ Phone _____

Address _____

Write prices in appropriate spaces

Ballet	(\$1.50)	_____
Roller Skating	(2.00)	_____
Time Town	(4.00)	_____
Kaydeross 1	(2.25)	_____
Fort Wm. Henry	(2.00)	_____
Howe Caverns	(4.00)	_____
Mets	(13.00)	_____
Gaslight Village	(5.00)	_____
Yankees	(13.00)	_____
Kaydeross 2	(2.25)	_____
Total		=====

Mail to: Middle School Rec.
8 Acorn Avenue
Elmira, N.Y. 12065

Make checks payable to:
Youth Recreation Program

Swimming

Director - Mr. Mark Lewis

Authorized Red Cross Instruction

Beginners
Advanced Beginners
Intermediates
Swimmers
Advanced Swimmers

Special Programs - Provided there is sufficient interest.

Competitive Swimming
Synchronized Swimming
Red Cross Life Saving

Site - SUNY Mohawk Campus

Sessions - July 1 - July 19

July 22 - August 9

August 12 - August 30 (Depending upon registration)

Classes to be held each weekday except July 4 from 8:00 AM until 12:30 PM

Transportation will be available from each of the Program sites.

Cost - \$5 per registrant

Eligible - residents of Clifton Park who have completed kindergarten

Registration

Swimming Only { When : Tuesday, June 4
Time : 7:30 PM - 9:00 PM
Where : Middle School A Cafeteria

Middle School Special Events (you may register by mail-use coupon)

Music - Middle School and Elementary

Horseback Riding - Middle School

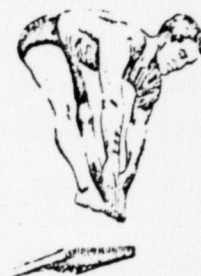
When : Wednesday, June 5

Time : 7:30 PM - 9:00 PM

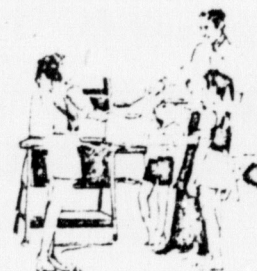
Where : Middle School A Cafeteria

It is important that students register for each of those activities which require registration. We reserve the right to limit numbers for certain activities and refunds cannot be guaranteed for cancellations made after two days prior to the event. Any fees are payable at registration. Checks should be made payable to: Youth Recreation Program.

TOWN OF CLIFTON PARK

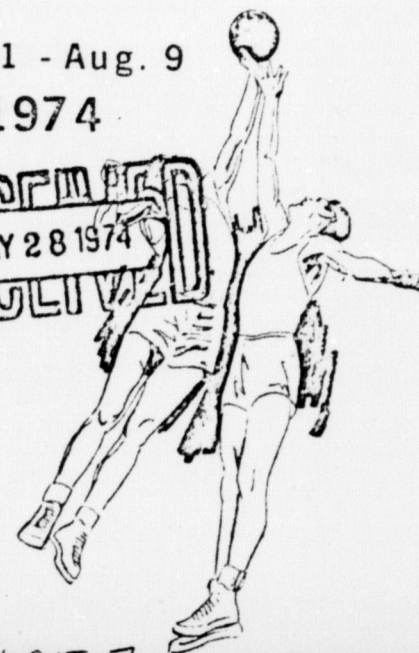
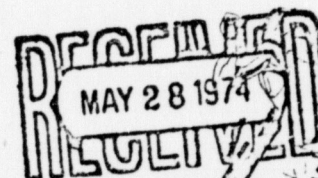


SUMMER RECREATION PROGRAM



MAY 29 1974

July 1 - Aug. 9
1974



Elementary School Recreation

Arongen - Director - Mr. Frank Greppo
 Glenciff - Director - Mr. Larry Kalota
 Okte - Director - Mr. Paul Angerami
 (Youngsters must have completed Kindergarten.)

DAILY ACTIVITIES

Physical Education
 Arts and Crafts
 Games
 Nature and Science Study
 Team Games

WEEKLY ACTIVITIES

Cook Outs
 Library Reading Hour
 Instructional Sports Clinics
 Baseball
 Football
 Basketball
 Wrestling

Music - (4th, 5th, 6th graders) - Mr. Ron Serapilio
 Band
 Guitar
 Instrumental

Registration required - June 5

Special Events

Doll and Model Show
 Bicycle Parade
 Pet Show
 Kite Flying Contest
 Junior Olympics
 Overnight Campout
 Penny Carnival
 Interplayground Competition
 Softball
 Volleyball
 Field Hockey

Cinderella - July 12
 Pinnocchio - July 26

Field Trips

Albany Airport
 Port of Albany
 Five Rivers Conservation Park



Middle School Recreation

Director - Mr. Joseph Nicoletta

The middle school segment of the recreation program is designed for youngsters who will enter grades 6, 7, 8 and 9 in the fall of 1974.

Classes in Arts and Crafts and Music will be held five days a week, Monday thru Friday, 9:00 am to 12 noon; in physical education three days a week, Monday, Tuesday and Friday, 9:00 am to 12 noon; and Special Events every Wednesday and Thursday.

Class Description

Arts and Crafts - instruction and experiences in ceramics, painting, sketching, textiles and jewelry-making and more. No registration necessary.

Music

- instruction in folk guitar and band instruments. Schedules to be worked out on registration night. \$3.50 registration fee for folk guitar instruction to cover purchase of guitar instruction book.

Mr. Richard Cruver
 Mr. Marc Johnson

Physical Ed.

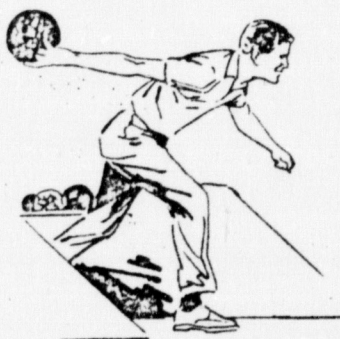
- instruction and activity in tennis, archery and team sports, including softball, basketball and others. Tennis and archery schedules to be worked out on registration night.

Ms. Carol Pratt

Horseback Riding - Monday and Tuesday two sessions each day 9:00 am to 11:00 am and 10:00 am to 12 noon. \$3.50 fee per ride. Registration required.

Bowling

- every Friday; two sections; 9:00 to 10:20 am and 10:30 to 12:00 noon. \$1.25 per session, includes two games and shoes. Bowling tournament with trophies concludes summer activity.



BASKETBALL LEAGUE,
 MUSIC & RIDING
 Register on June 5th

High School Recreation

Director - Mr. Dan D'Amboise

The High School segment of the recreation program is designed for students entering grades 10, 11, and 12 in the fall of 1974.

The Program Will Include

COMPLETE PHYSICAL FITNESS PROGRAM - DAILY

Agility
 Flexibility
 Endurance
 Strength - Utilizing the Universal Gym

There will be awards for successful completion of the Program.

Plus

SPORTS CLINICS

Basketball - July 22 - 26
 July 29 - August 2

Wrestling - July 15 - 19

Track - every Wednesday evening
 July 10, 17, 24, 31 August 7

Gymnastics - Monday, Wednesday, Friday
 July 8, 10, 12, 15, 17, 19, 22,
 24, 26

Program Dates

The Town of Clifton Park Summer Recreation Program will begin Monday, July 1, and continue weekdays, with the exception of Thursday, July 4, through August 9. Daily activities will begin at 9:00 a.m. and end at 12 noon, rain or shine. An exception to the above will be the swim program which will begin at 8:00 a.m. and end at 12:30 p.m. daily depending upon weather conditions. Further details about any program will be available on the Registration Nights. If you have any questions, please call or write:

Richard Erdoes
 Director of Recreation
 4 Tulip Terrace
 Elmore, N. Y. 12065
 Phone: 371-6544

BASKETBALL LEAGUE
 GRADES 10, 11, 12
 REGISTER JUNE 5

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Exhibit 8, Annexed to Affidavit of Rex Kitchen

[PHOTOSTATS]

(Opposite) 

County Legislative

Report

RECEIVED
JAN 15 1974

Six months have passed since I took office on January 1, 1974 as your County Legislator from the 31st District in the Town of Guilford. After six monthly meetings, 153 Resolutions or Bills have been considered and Four Local Laws have been considered. I personally sponsored or co-sponsored eight Resolutions and one Local Law. Six of these Bills passed and two are now in Committee. A public hearing was held on the Local Law to establish a County Department of Parks, Recreation and Conservation and the measure is presently back in committee for further consideration.

I have been assigned to two Standing Committees: County Improvements and Judiciary. The County Improvements Committee has been charged by the legislature to study and propose rule changes to make the transfer from the present form of county government to the Elective County Executive in 1975, as smooth as possible. This committee meets monthly and is open to the public a day for Albany County.

Much has been written and reported in the media about the suburban reform or insurgent movement in the Democratic Party. I have been identified with this bloc and felt responsible for changing what is a very closed one party operation into an open forum. However, in no event, will I allow this affiliation to interfere with my obligation to effectively represent your interests.

Thank you for providing me with the opportunity to serve as your representative.

Sincerely,

James E. Buckley Jr.

Fiscal Measures

I stressed to you during my campaign that I would work to promote fiscal responsibility within your county. I report to you now that I supported the following measures:

- ▣ the investment of "idle" funds of the county into interest bearing accounts to create additional county revenues thereby offsetting a portion of the county's tax burden. This resolution was adopted and is now in effect.
- ▣ the creation of the position of County Chief Investment Officer to invest monies of the county again thereby creating additional revenues. This resolution was adopted and is now in effect.
- ▣ the retaining of an expert in the area of gathering data and preparing applications for federal reimbursement of welfare services. In 1973, the county failed to apply for such funds despite their availability. This resolution was adopted and is now in effect.

Welfare Problems

As a result of the outrage expressed by both the public and press at the numerous Welfare Fraud Cases brought to light since November of last year, the Albany County Department of Social Services has reported the following for the period January 1, 1974 to May 1, 1974:

- ▣ thirty-two warrants were issued for Welfare Fraud totaling \$59,061. Twenty arrests involving \$28,274 have been made. Fifteen of the arrests have been settled resulting in a return of \$16,268 to the county.

EXHIBIT 8

Tax Sharing with the School District

In keeping with my desire to offset school district taxes, I, along with several other legislators, met with the Administration of the Guilderland School District for the purpose of submitting legislation for returning a portion of our sales tax revenues to the school district. At the July meeting of the legislature, I plan to introduce a Resolution appointing a committee to study the fiscal impact of this proposal upon the County's operations. Considerable opposition is anticipated.

Environment

&

Recreation

Presently, there is no county sponsored system of parks and recreation areas but rather a grouping of Local and State Parks. Tawassentid Park is the only recreational facility, other than school grounds, in our town.

To make additional facilities available, I have introduced the following Resolutions:

☒ a Local Law calling for the creation of a County Parks, Recreation, and Conservation Department to oversee the establishment, operation and maintenance of a county wide parks system.

☒ a Resolution calling for the establishment particularly of a Normanskill Trail providing for scenic undeveloped trails along the length of the Normanskill in the Town of Guilderland. Strong support is anticipated.

Legislative Housekeeping

☒ supported committee chairmen in efforts to open committee meetings to the public. Previously, if committees met at all, it was in private.

☒ insisted that the minority party have representation on each and every committee. Previously, the majority party exclusively controlled one committee.

☒ insisted that committees be allowed to submit minority reports. Previously, only majority reports were recognized.

☒ supported legislation requiring scheduled monthly meetings. Previously, the legislature was required to meet only four times annually.

Gotta' Gripe?

Use the space provided below, fill in your suggestions, and mail them to me at:

29 Pinewood Road
Guilderland, 12084

As your representative, I am concerned about those things that you feel interested in, but unless you let me know where your interests rests, it is very hard for me to get the results that you wish. So please, send in your suggestions.

THIS NEWSLETTER IS PRINTED AT NO EXPENSE TO YOU, THE TAXPAYER

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Exhibit 9, Annexed to Affidavit of Rex

[PHOTOSTAT]


(Opposite) 

EXHIBIT 9

GAZETTE PHONE 374-4141

31

Rotterdam Prohibits Doorknob Deliveries

By PEG CHURCHILL
Gazette Reporter

The Town of Rotterdam last night became the first area municipality to ban the door-to-door distribution of unsolicited advertising material.

* * *

By unanimous vote, the Town Board enacted a local law aimed at eliminating plastic bags containing advertising materials and product samples which are regularly left on doorknobs of private homes.

The law will become effective Sept. 10.

Immediately after the board vote, the president of a Delmar firm which delivers bagged advertising circulars said some action would be taken to fight the measure. Rex Kitchen, president of Ad Express, said, however, that he did not know what that action would be.

Ad Express yesterday sent telegrams to each Town Board member urging further delay on the local law in order that the firm might present "new evidence."

* * *

Councilman Benjamin Wollner, Democrat, chairman of the ordinance committee which drafted the law, said he could "see no reason to belabor the issue." He moved its adoption.

Supervisor John F. Kirvin said that while he deeply regretted that there would be the loss of some part-time employment by some residents, the advantages of this law being passed far outweigh the economic implications.

Kirvin, in a prepared statement, said he favored passage for four reasons: security of residences, delivery by chil-

dren, rights of citizens whereby delivery of unsolicited materials constitutes unlawful trespass, and the safety hazard of plastic bags.

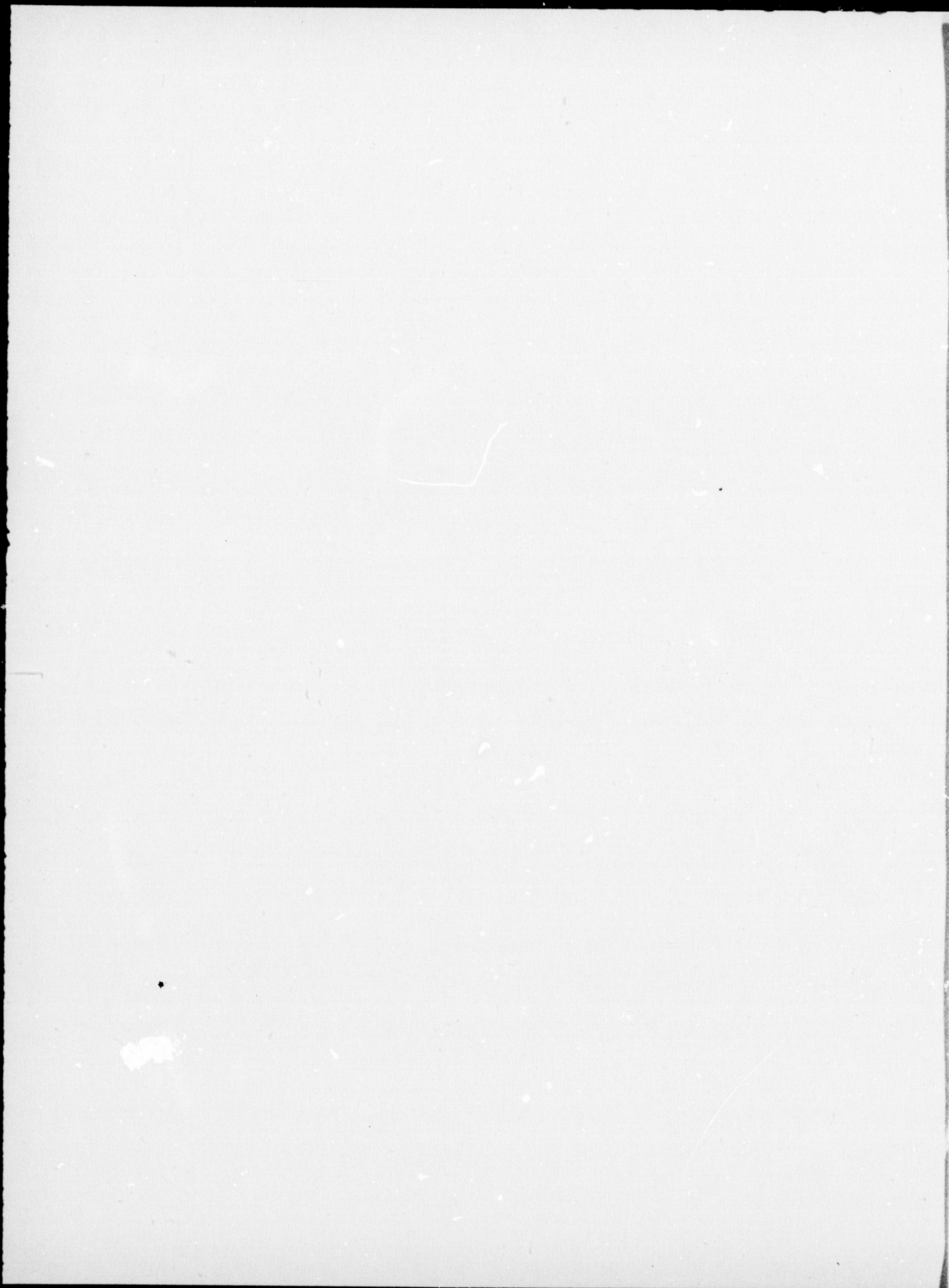
The Democratic supervisor said he has concluded that "the delivery of unsolicited materials falls in the realm of an invasion of privacy much the same as nuisance or unsolicited telephone calls."

* * *

At the July 2 public hearing on the law, Kitchen argued that his company serves as a link between the consumer and the businessman by providing advertising that might otherwise be unavailable because of increased mailing costs. He said Ad Express provides part-time employment for about 400 housewives.

Among those favoring the measure were representatives of the mail carriers' union who contended that the hand-delivery of such material was depriving the post office of business and might eventually lead to higher postal rates.

Specifically exempted from the prohibition are articles mailed to the home and newspapers and materials distributed by charitable or nonprofit organizations.




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Exhibit 10, Annexed to Affidavit of Rex Kitchen

[PHOTOSTAT]

(Opposite) 



10 Commercial Road, Albany, New York 12205

Telephone: [518] 438-8451

Dear Consumer:

AD-EXPRESS, INC. is a private postal system serving the Capital District community including Amsterdam and Saratoga County.

Each week our staff of over 300 housewives bring to your home literature containing valuable savings from your favorite stores.

We regret that you have requested cancellation of our service to your home.

Please fill in and return the attached form and we will stop delivery upon receipt.

If you have any questions, feel free to call us at the above number.

Cordially,
AD-EXPRESS, INC.

Rex D. Kitchen
President

AD EXPRESS, INC.
REQUEST TO STOP DELIVERY

NAME: _____

STREET: _____

CITY: _____

STATE: _____

ZIP CODE: _____

REASON FOR REQUEST: _____

SIGNATURE: _____

EXHIBIT 10



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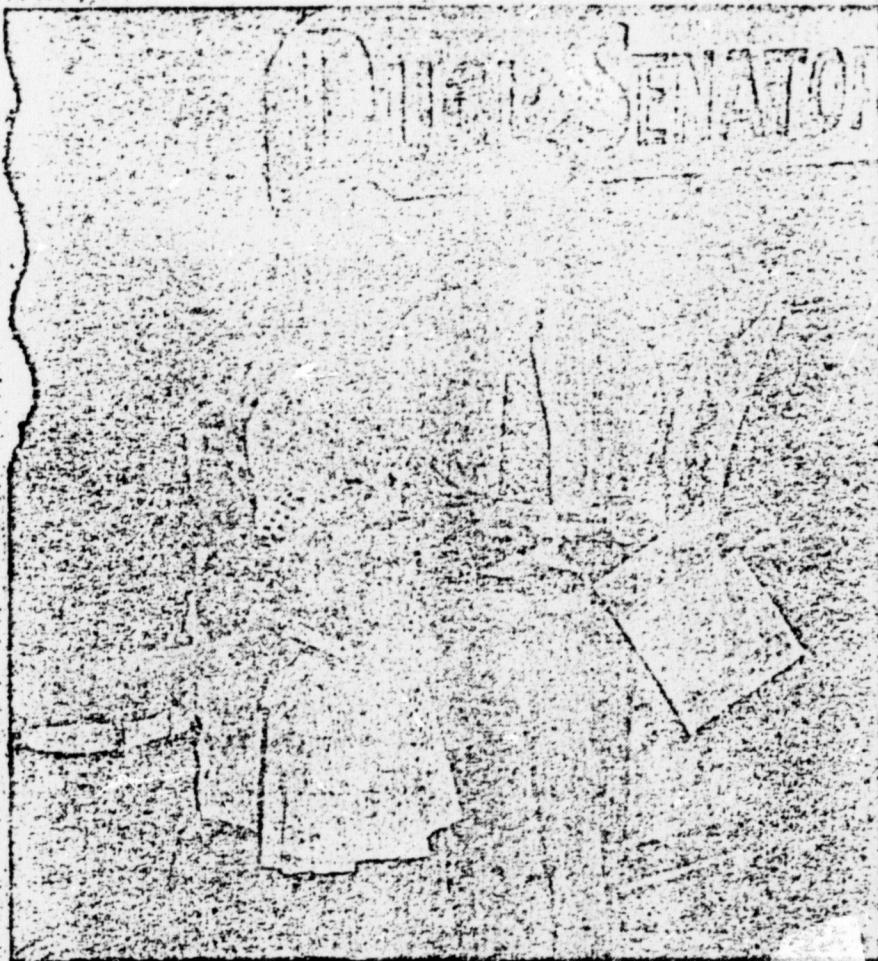
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Exhibit 11, Annexed to Affidavit of Rex Kitchen

[PHOTOSTAT]

(Opposite) 



—(Gazette Photo—Frank Duci)

WALKING CAMPAIGN — Mayor Frank Duci, right, and three of an estimated 50 members of his citizens committee begin door-to-door distribution of flyers urging voters for Duci for State Senate in the Sept. 10 primary. From left are Jack Quigley, Tony Kapusta. Duci said the door-to-door campaign was prompted mostly by a desire to meet as many of the voters in the 44th District as possible, and partly by financial inability to mail circulars to all voters in the five-county district. "It's a big district," he said, "but I intend to meet and talk to as many people in the district as I can before the primary."

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EXHIBIT 11



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Exhibit 12, Annexed to Affidavit of Rex Kitchen

[PHOTOSTAT]

(Opposite) 

Duci wants to keep ads off door knobs

Schenectady Mayor Frank J. Duci wants to prevent advertising companies from hanging their products on doors of city homes.

Duci noted that the Towns of Rotterdam and Colonie have legislated against the advertising firms.

The mayor has asked Rosario Negri, city corporation counsel, to check with Rotterdam officials on how legislation was passed.

"We should find out if Rot-

terdam is receiving any constitutional challenges to its ordinances from the advertising companies," Duci said.

The mayor complained that the advertising flyers were open invitations for burglars and vandals.

"If you're away from home and these things hang on your door for two or three days, that's just asking for trouble.

"A lot of people don't like

this trash piled on doorsteps and I've heard plenty of complaints." From what I hear, 90 per cent of the people throw the advertising bag in the garbage without even opening the thing," Duci said.

The mayor brought up the subject at this week's Schenectady City Council caucus.

Freshman Councilman David W. Roberts admonished the mayor, saying the legislation might be construed as jeopardizing private enterprise.

dizing private enterprise.

"All I know is, Rotterdam and Colonie passed legislation so why can't Schenectady?" Duci answered.

The mayor said he had discussed the situation with Robert Massaroni and Robert LeGere, officials of the Schenectady Letter Carriers Union, and they said they were against the practice of leaving advertisements in the open to attract attention to unoccupied residences.

EXHIBIT 12



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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE:
and PENNY WEBER,

Plaintiffs

-against-

Civil Action

No. 74-CV-401

Affidavit

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
Members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

Defendants

STATE OF NEW YORK)
COUNTY OF SCHELECTADY) SS.:

ANDREW GALLO, being duly sworn, deposes and says:

1. That your deponent is a plaintiff in the above-entitled action, and is thus familiar with the facts underlying said action insofar as they bear upon me and my business.

2. I am the President and principal stockholder of ANDY GALLO CONSTRUCTION CORPORATION, doing business under the name 4 SEASONS VARIETY STORE, of which I am the managing employee. The store deals primarily in lawn and garden equipment, power tools, hand tools, hardware, cookware, paints and household furnishings. The store is located at 2621 Guilderland Avenue, in the Town of Rotterdam.

3. I have had occasion to use the services of AD-EXPRESS, INC. in the recent past to distribute my store's spring circular published by Century Hardware Company. This circular was distributed by AD-EXPRESS, INC. delivery personnel throughout the Town of Rotterdam. The results obtained were at least equal to those obtained by direct mail advertising. It has been my experience that as to reliability and time of delivery that AD-EXPRESS, INC.'s services are superior. AD-EXPRESS, INC.'s price is significantly less than direct mail and much less than the equivalent price of distribution by the Schenectady Gazette, which I believe to be the only newspaper of general circulation serving Rotterdam.

4. As a result of the passage of the Town of Rotterdam's Local Law No. 13 for the year 1974, I have become greatly concerned over the continued use of AD-EXPRESS, INC.'s services. My uncertainty over the legal status of Ad-EXPRESS, INC.'s delivery methods has forced me to cancel a Christmas circular which I had ordered. I had arranged with AD-EXPRESS, INC. to distribute this circular in Rotterdam during the month of November. Now, of course, I am forced to cancel this contract. I have also decided not to order a paint circular which I had intended to have AD-EXPRESS, INC. deliver along with the Christmas circular.

5. It would be wholly economically impossible for me to obtain written authorizations from home owners for

delivery of this matter by AD-EXPRESS, INC. and obviously, AD-EXPRESS, INC.'s price would be greatly increased if they are forced to do so.

6. AD-EXPRESS, INC. is the only medium through which I can afford to advertise in this matter and the demise of the company would deprive me of a valuable business tool and asset.

WHEREFORE, I join in plaintiff's prayer for preliminary equitable relief in this matter.

s/ Andrew Gallo
Andrew Gallo

Sworn to before me this

21 day of September, 1974.

s/ Susan A. Condon
Notary Public, State of New York
Qualified in Albany County
My Com. Expires 3/30/75.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as President
of AD-EXPRESS, INC.; ANDREW GALLO,
Individually and as President of ANDY
GALLO CONSTRUCTION CORP., d/b/a 4 SEASONS
VARIETY STORE; and PENNY WEBER,

Plaintiffs

-against-

Civil Action

No. 74-CV-401

Affidavit

JOHN F. KIRVIN, Supervisor of the Town of
Rotterdam, New York; BENJAMIN WOLLNER,
FRANCIS L. STONE, PETER LA MALFA, and
WILLIAM OSTA, as Members of the Town
Board of the Town of Rotterdam, New York;
EDWARD LONGO and JOHN LA MALFA, as Town
Justices of the Town of Rotterdam, New
York; and JOSEPH S. DOMINELLI, as Chief
of Police of the Town of Rotterdam,
New York,

Defendants

STATE OF NEW YORK }
COUNTY OF Schenectady } SS.:

PENNY WEBER, being duly sworn, deposes and says:

1. That I am one of the plaintiffs in the above-entitled action and, therefore, familiar with the facts and circumstances underlying such action insofar as they bear upon me.
2. As set forth in the complaint herein, deponent independently contracts with AD-EXPRESS, INC. to deliver advertising materials to residences along four routes in the Town of Rotterdam. I, myself, reside, along with my husband and four children, at 1021 Outer Drive, Town of Rotterdam.

3. As a result of my work for AD-EXPRESS, INC., I make approximately \$100.00 to \$120.00 every two weeks, plus \$8.00 per week for my supervisory duties. This money is commonly used by my family to provide extra activities for my children and quite often it puts food on our table as well. My husband is employed by the Thruway Authority and as a result of his hours he cannot obtain additional employment, so that my work is a virtual necessity.

4. I am scheduled to deliver my routes in Rotterdam on September 23, and 24, 1974, next Monday and Tuesday afternoons. Last week while making my deliveries I saw police cars cruising the street, became fearful, and went home for awhile before finally finishing my deliveries. I have also been continually harassed by mailmen and other employees of the United States Postal Services since I first began making deliveries for AD-EXPRESS, INC.

5. It is my understanding that the Town of Rotterdam's Local Law No. 13 for the year 1974 makes such deliveries as I have heretofore made a criminal offense, subjecting me to a \$50.00 fine for my first infraction and \$100.00 for each subsequent infraction. Therefore, unless the defendants are enjoined from enforcing this ordinance, I will not make any further deliveries for AD-EXPRESS, INC.

6. In the course of speaking to acquaintances and other ladies under my supervision who deliver for AD-EXPRESS, INC. in the Town of Rotterdam, all have informed me that as a result of the ordinance they will refuse to make further deliveries for AD-EXPRESS, INC.

7. If I am unable to continue my delivery work for AD-EXPRESS, INC., I and my family will suffer a very substantial loss of income and reduction of our standard of living. I am not aware of any equivalent employment which I could obtain whereby my duties as housewife and mother could still be fulfilled.

8. It is by no means clear to me, from a reading of the statute, what is meant by "advertising material". It would appear that everything I have ever delivered, from Montgomery Wards circulars to church and civil group announcements could be classified as advertising material.

WHEREFORE, deponent respectfully joins in plaintiffs' prayer for preliminary equitable relief.

s/ Penny Weber
Penny Weber

Sworn to before me this
21 day of September, 1974.

s/ Susan A. Condon
Notary Public, State of New York
Qualified in Albany County
My Com. Exp. 3/30/75 .

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE;
and PENNY WEBER,

Plaintiffs

-against-

Civil Action
No. 74-CV-401
Affidavit

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
Members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York.

Defendants

STATE OF NEW YORK }
COUNTY OF ALBANY } SS.:

JOHN L. SCHMITT, being duly sworn, deposes and says:

1. That I am President of Big Brothers-Big Sisters of Albany County, Inc., a not-for-profit corporation duly formed and existing under and by virtue of the laws of the State of New York. I make this affidavit in support of plaintiffs' instant motion for preliminary equitable relief.

2. Big Brothers-Big Sisters of Albany County, Inc. is an organization whose objectives are to provide adult guidance, counselling, companionship and moral guidance to fatherless boys and motherless girls in Albany County by means of volunteer work. A major part of our program consists of acquainting the public with the existence, nature and objectives of our organizations for

the purpose of soliciting public support, financial contribution, and, most importantly, volunteers to participate in our program.

3. During the summer of 1974 AD-EXPRESS, INC made three free distributions of materials for Big Brothers-Big Sisters of Albany County, Inc., as set forth more fully in the affidavit with annexed exhibits of REX KITCHEN. As a result of these distributions we received a wholly unprecedented response from the public, including eleven volunteers to participate as big brothers or big sisters in our activities.

4. Generally speaking, we have little or no money budgeted for media advertising, and obviously what money is spent on advertising must be taken away from our central programs. We depend heavily upon the type of public-spirited donations of services and time extended to us by AD-EXPRESS, INC.

5. I am advised by our legal counsel that the type of printed matter which we distributed through AD-EXPRESS, INC. is entitled to full First Amendment protections. These materials could not have been successfully distributed any other way.

6. To force AD-EXPRESS, INC. to obtain prior written consent to deliver this matter would place an even greater economic burden upon them and would likewise be impossible for us.

7. More importantly, such a requirement would give us access only to those persons already favorably disposed to us, whereas our real goal is obviously to reach those who may be ignorant of our existence and purposes or unfavorable disposed to us. Freedom of speech and press is meaningless in a very practical way to our organization unless it also encompasses the right to

reach and persuade all persons.

8. If AD-EXPRESS, INC. is forced out of business by the challenged ordinance of the Town of Rotterdam and/or those ordinances which, I am informed, are now pending in the Town of Colonia and North Greenbush, my organization as well as many similar ones will be deprived of its services permanently and our First Amendment rights will thus be significantly curtailed.

WHEREFORE, deponent joins in plaintiffs' prayer for preliminary equitable relief.

s/ John L. Schmitt
John L. Schmitt

Sworn to before me this

23 day of September, 1974.

s/ Susan A. Condon
Notary Public, State of New York
Qualified in Albany County
My Com. Expires 3/30/75

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE;
and PENNY WEBER,

Plaintiffs,

Civil Action NO.

-against-

AFFIDAVIT IN OPPOSITION
TO MOTION FOR PRELIMINARY
INJUNCTION

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
members of the Town Board of the Town
of Rotterdam, New York, EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

Defendants.

STATE OF NEW YORK
COUNTY OF SCHENECTADY

SS:

JOHN F. KIRVIN, being duly sworn, deposes and says:

1. I am the Supervisor of the Town of Rotterdam and make this
affadavit in opposition to the plaintiffs' motion for a preliminary injunction.
2. The plaintiffs seek a preliminary injunction enjoining the
defendant Town of Rotterdam from enforcing Local Law No. 13 for the year
1974, adopted on August 21, 1974, which prohibits the distribution of ad-
vertising materials or samples at homes within the Town by placing such material
on private premises without the consent or pursuant to the request of the

resident." The said Local Law appended hereto as "Exhibit 1".

3. The Town Board adopted the said Local Law in the exercise of its police power after due consideration and upon a determination that the prohibitions contained therein would be in the best interests of the welfare of the residents of the town, in that the enforcement thereof would preclude: (1) the accumulation of advertising materials on the porches or in front of homes where the residents are away for a number of days, thereby eliminating a possible hazard to the security of the home to the extent that such accumulations are public notice to potential intruders and burglars that the house is unoccupied; (2) the nuisance attendant to the retrieving of these advertising materials by the resident and their disposition, and (3) the potential safety hazard of the plastic distribution bags in the hands of small children.

4. The factors to be considered by the court on this motion for a preliminary injunction are (1) whether the plaintiffs are likely to prevail on the merits; (2) whether plaintiffs are in danger of suffering irreparable harm, if the motion is not granted, before the case can be decided on its merits, and (3) whether the potential harm to the defendant Town of Rotterdam from the issuance of the injunction, outweighs the possible harm to the plaintiffs if injunctive relief is denied.

(AMERICAN GENERAL INSURANCE CO. v. FTC, 359 F. Supp. 887).

5. On the question of irreparable harm, the moving affidavits make broad and conclusory allegations to the effect that if AD-EXPRESS is prevented from carrying on business in the Town of Rotterdam by the enforcement

of the Local Law in question, then it will be put out of business. However, such allegations are not substantiated by any facts or figures which would indicate the estimated monetary loss, if any, which would result in relation to its income from the entire marketing area. The affidavit of KITCHEN states that AD-EXPRESS serves the counties of Albany, Schenectady, Rensselaer and parts of Saratoga. Considering the total population in the geographical area served by AD-EXPRESS, it is difficult to accept the claim that cessation of business within the Town of Rotterdam, pending the determination of this case in its merits, would have such a traumatic effect on the profits of the company as to force its demise. KITCHEN states that the company profit margin depends wholly upon regular business from its major commercial clients. There are no affidavits submitted by any of its commercial clients suggesting that they will withdraw their business if the Rotterdam market is no longer available to AD-EXPRESS. What other municipalities may or may not do in relations to the adoption or enforcement of similar prohibitory local legislation is entirely a matter of speculation and in any case immaterial to the instant case. That other municipalities have adopted, or are considering the adoption of, similar legislation is material, however, on the question of the appropriateness and necessity therefor in the public interest

6. On the question of the balancing of hardship, as noted above the most that AD-EXPRESS can suffer is perhaps a diminution of profits attributable to its business in the Town of Rotterdam. On the other hand, the continued distribution of the advertising materials constitutes a continuing

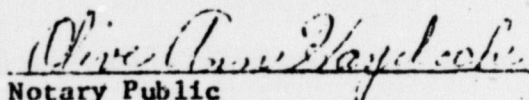
nuisance to those Rotterdam residents who do not want to be bothered with them, and more importantly remains a potential hazard to both home and children. Accidents or crimes are, of course, not predictable. But it indeed would be tragic if only one family suffered a personal loss resulting from the continued operation of AD-EXPRESS in Rotterdam.

7. On the question of probability of success, it is submitted that there is no merit to plaintiffs' contention that the Local Law in question violates the constitutional guarantee of free speech, and deprives plaintiffs of their constitutional right of equal protection under the laws. As noted in the Memorandum of Law submitted herewith, local legislation substantially similar to the instant Local Law has been constitutionally sustained by both state and federal courts.

8. Therefore, the motion for a preliminary injunction should be denied because (1) the plaintiffs have not factually established that they will suffer irreparable harm; (2) the public interest to be served by such denial far outweighs any possible financial loss which might be incurred by plaintiffs; and (3) on the weight of legal authority, plaintiffs have no probability of success on the merits of the case.


John F. Kirvin, Supervisor
Town of Rotterdam

Sworn to before me
this 4th day of October, 1974.


Notary Public
State of New York

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORES;
and PENNY WEBER,

Plaintiffs,

Civil Action No.

-against-

74-CV-401

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New
York,

SUPPLEMENTAL
ATTORNEY'S
AFFIDAVIT

Defendants.

STATE OF NEW YORK)
COUNTY OF ALBANY) SS.:

PAUL R. KIETZMAN, being duly sworn, deposes and says:

1. That I am the attorney for the above-captioned plaintiffs
and I am, therefore, fully familiar with all of the facts and
proceedings heretofore had herein.

2. That on the 17th day of October, 1974, in the Justice
Court of the Town of Rotterdam, your deponent appeared with and
on behalf of MAURICE MEDOFF and ALFRED PALUMBO, two persons who
were charged with first violations of the Town of Rotterdam's

Local Law No. 13 for the year 1974. So far as is known to your deponent these two persons are the only ones as yet charged with such violations. To my knowledge these two persons are the only ones connected in any fashion with AD-EXPRESS, INC., who have been arrested and charged with such violations inasmuch as defendants have apparently agreed to await the outcome of the instant application for preliminary equitable relief before enforcing the ordinance against any other persons.

3. That on the above date and at the above place your deponent made oral motions before Judge EDWARD LONGO requesting a dismissal of the charges against Mr. PALUMBO and Mr. MEDOFF upon the same constitutional grounds asserted in this action. That these said motions were denied by the said Judge LONGO from the bench. That thereafter the said Mr. PALUMBO and Mr. MEDOFF entered pleas of guilty to the charged offenses.

4. That these individuals above-named are not plaintiffs in the above-captioned matter, nor was any attempt made to enjoin these pending prosecutions at the time of plaintiffs' initial application for preliminary equitable relief.

5. That so far as is known to deponent there are no similar prosecutions pending against any agent, servant, employee or subcontractor of any named plaintiff, nor against any other person. That therefore the instant federal litigation will in no way

impede, interfere with, impinge upon or in any way influence any parallel proceeding or prosecution in any state court.

/s/ Paul R. Kietzman
Paul R. Kietzman

Sworn to before me this
18th day of October, 1974

/s/ Susan A. Condon
Notary Public - Albany County
Commissioned in Albany County
My Commission expires March 30, 1975

File # 1088

74 CV 411

Rotterdam

Maurice Medoff

Defendant
6B Orchard Street
Delmar, N.Y.

ALBANY, NEW YORK

ORDINANCE INFORMATION

BE IT REMEMBERED, that John H. Winters (Police Officer), residing in Rotterdam, County of SCHENECTADY, N.Y., now come before

Edward Longo, Esq., a Justice of Peace of the TOWN of ROTTERDAM, in the County of SCHENECTADY, N.Y. and give information under oath as follows:

That said Maurice Medoff, on the 12 of September, 1974, at the 1130 Vinewood Ave, TOWN of ROTTERDAM, County of SCHENECTADY, N.Y., at about 9:45 o'clock Fore noon of said day, did violate Local Law #13 Delivery of Ad. Mat. in the Town of Rotterdam Ordinance, adopted by the Rotterdam Town Board. In that defendant did on September 12, 1974 did deliver to and hang on the door handle of the front door a packet of advertising material at 1130 Vinewood Ave. This material not having been requested or asked for by the resident of the property.

WHEREFORE, deponent prays that an investigative summons warrant be issued for the appearance of said Maurice Medoff before a Town Justice of the Town of Rotterdam for the violation of said Rotterdam Local Law #13 Ordinance.

WITNESSED BEFORE ME THIS 12 DAY

September, 1974

Edward Longo, Jr.
TOWN JUSTICE

John H. Winters
Complainant

Rotterdam Police
Address

Town of Rotterdam
(Town) (City) (Village)

Schenectady, New York
County State

TOWN OF Rotterdam

Against

Alfred Palumbo
Defendant

ORDINANCE INFORMATION

DEPOSED 1133 Barber Dr
ROTERDAM, NEW YORK

BE IT REMEMBERED, that I Ptl E Marczewski, residing in
TOWN OF ROTTERDAM, County of SCHENECTADY, N.Y., now come before Edward

ongo, Esq., a Judge of the TOWN of ROTTERDAM, in the County of SCHENECTADY, NY, and give information under oath as follows:

That on Alfred Palumbo, on the 16th
September, 1974, at 1133 Barber Dr
TOWN OF ROTTERDAM, County of SCHENECTADY, N.Y., at about 4:00 o'clock
After noon of said day, did violate Law #13 Sub. 1
of the Town of Rotterdam Ordinance, adopted by the
Town Board, on August 21, 1974, effective on September 10, 1974, in that defendant did on
said date go from house to house on Barber Dr and did put on several
house door knobs a plastic bag containing "Unsolicited Advertising Material"
which is in ~~direct~~ direct violation of Town of Rotterdam Local Law #13
which was passed by the town board on August 21, 1974 and became effective on
September 10, 1974.

WHEREFORE, deponent prays that an investigative summons warrant be issued
for the appearance of said Alfred Palumbo
before a Town Justice of the Town of Rotterdam for the violation of said Rotterdam
Town Ordinance.

WITNESSED BY ME THIS 16 DAY

September 1974

Edward J. Long T.J.
TOWN JUSTICE

E. Marczewski
Complainant
Rotterdam Police
Address
Rotterdam
(Town) (City) (Village)
Schenectady New York
County State

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AD-EXPRESS, INC.; REX KITCHEN, as
President of AD-EXPRESS, INC.;
ANDREW GALLO, Individually and as
President of ANDY GALLO CONSTRUCTION
CORP., d/b/a 4 SEASONS VARIETY STORE;
and PENNY WEBER,

Plaintiffs,

-against-

74-CV-401

JOHN F. KIRVIN, Supervisor of the
Town of Rotterdam, New York;
BENJAMIN WOLLNER, FRANCIS L. STONE,
PETER LA MALFA, and WILLIAM OSTA, as
members of the Town Board of the Town
of Rotterdam, New York; EDWARD LONGO
and JOHN LA MALFA, as Town Justices
of the Town of Rotterdam, New York;
and JOSEPH S. DOMINELLI, as Chief of
Police of the Town of Rotterdam, New York,

Defendants.

APPEARANCES:

OF COUNSEL:

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PAUL R. KIETZMAN

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SEBASTIANO OCCHINO

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiffs challenge a recently enacted ordinance in the Town
of Rotterdam, Schenectady County, by the Town Board entitled "A

Local Law Prohibiting the Distribution of Unsolicited Advertising Materials in the Town of Rotterdam" . . . Local Law No. 13-1974.

It provides, in its relevant sections, that:

- (Section 1) It shall be unlawful for any person to leave hanging any kind of bag or bags containing advertising materials or samples, or to distribute advertising material or samples at a home located within the Town of Rotterdam, New York, other than the home of the person soliciting the same, by placing such material at the home or on the property of the person owning or occupying such home, unless the person distributing such advertising material or samples obtains the written consent of the person occupying the home.
- (Section 2) The foregoing provision shall not apply to the distribution of advertising materials through the U. S. Postal Services. The provision of this ordinance shall not apply to the distribution of any newspaper of general circulation nor to materials distributed by charitable or non-profit organizations.

The potential fine to any person, or corporation, violating this ordinance is a maximum of \$50.00 fine for the first offense and \$100.00 for subsequent offenses. The essence of this law is a prohibition upon deliveries of advertising or samples to residences without the prior consent of the occupant.

The plaintiffs here are engaged in the business of distributing primarily advertising in the form of printed circulars. Numerous of these circulars are packaged inside plastic bags which have a hole at the top to facilitate attachment to any protruding appendage of the typical house or apartment, e.g., the doorknob or lamppost. In some

instances they are attached to rural delivery mail boxes by means of the commonly known twist-tie wires used on many household products. According to the complaint, the technique for distributing these plastic bags is by saturating a whole neighborhood weekly or twice weekly with them. Prior to this ordinance, there were no restrictions in Rotterdam regulating the attachment of the bags upon local residences or barring such distribution. However, Ad Express, Inc. maintains a policy by which deliveries can be terminated upon written or telephonic request. (Affidavit of Rex Kitchen, para. 18). While this policy is laudable, it has no bearing, in my judgment, upon the fundamental issue of the scope of local police power under the First and Fourteenth Amendments of the United States Constitution.

The chief plaintiffs, Ad-Express, Inc. and Rex Kitchen, individually and as President of Ad-Express, Inc. (hereinafter Ad-Express), solicit advertising and package it in the plastic bags; plaintiff, Penny Weber, is one of a number of so-called independent contractors who make the deliveries to residences; and plaintiff, Andrew Gallo, is a merchant and advertising client of Ad-Express. Ad-Express describes itself as engaged in business as a private postal delivery service primarily handling second and third class matter as a saturation medium within Albany, Rensselaer, Schenectady and Saratoga counties. They complain that this ordinance violates numerous of their rights under the United States Constitution and invoke jurisdiction under 28 U.S.C. §§ 1331(a), 1343, and 2201 et seq. with auth-

orization for the suit under 42 U.S.C. § 1983. The plaintiffs move for a preliminary injunction against enforcement of this ordinance and request a declaratory judgment that it is unconstitutional on its face. By an order to show cause, an application by plaintiffs for a temporary restraining order, essentially to restrain the institution of any criminal or civil proceedings against any of the named plaintiffs pursuant to the ordinance, was returnable and heard in my Chambers at 10:00 a.m., September 24, 1974. With the consent of the Assistant Town Attorney of Rotterdam, I signed a temporary restraining order effective 11:45 a.m. on that date to remain in effect until the hearing of the motion for a preliminary injunction on October 7, 1974. At that time, the temporary restraining order was continued, again with the consent of counsel for defendants, pending this decision. No motions were filed for the defendants, but it was called to the attention of this Court that the Town of Rotterdam had two pending prosecutions involving persons other than the plaintiffs named here, pursuant to this ordinance and that these prosecutions would be stayed until a decision of this Court. These two persons were under prosecution for delivering these bags as independent contractors, although one of them, Mr. Medoff, also serves in a managerial capacity for Ad-Express, Inc. The prosecutorial information, however, does not describe Mr. Medoff in this capacity.

Recognizing that such a situation could raise problems in the light of the recent decision of the United States Supreme Court in *Steffel v. Thompson*, 415 U.S. 452 (1973), both counsel were requested during the October oral argument of the motion for a preliminary in-

junction to assess the import of this case to the instant controversy. Thereafter, a significant development occurred, when Attorney Kietzman, counsel for plaintiffs here as well as the two defendants facing prosecution in Rotterdam, moved formally on October 17, 1974 in the Justice Court, Town of Rotterdam, to dismiss the pending informations on the grounds that this same ordinance under challenge in this District Court is unconstitutional. The same contentions presented here were urged before Town Justice Edward Longo and in ruling from the bench, Justice Longo denied the motions. The two defendants then pleaded guilty and sentencing was deferred pending the outcome of this federal case. At this time, no appeal has been filed from the denial of the Town Justice Court to the challenges of unconstitutionality. The pending prosecutions under this ordinance filed before the filing of the complaint in this federal action on September 24, 1974 have therefore been disposed of at least to the plea stage by the Justice Court, Town of Rotterdam, and this Court has been further advised by the Town Counsel of Rotterdam (Letter October 23, 1974) that there are no other prosecutions pending. Therefore, the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) that federal courts should not interfere with state criminal prosecutions is no longer applicable. The threats of prosecution to the plaintiffs named here must be considered real and the *Steffel* rulings would not now prohibit at least

declaratory relief to persons [Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972)], such as plaintiffs who did not present and have not previously had adjudicated their claims of unconstitutionality of this ordinance in a state judicial forum. See Thistlethwaite v. The City of New York, ____ F.2d ____, Slip Op. 3441 (2d Cir. May 13, 1974).

The essential prohibition of this ordinance from its material wording is that distributors of primarily advertising materials and/or samples must obtain the prior written consent of the intended distributee before the plastic bags can be left hanging, in plain view, from doorknobs or other outside portions of a home or apartment. The plaintiffs claim in the words of their attorney that the additional expense of obtaining this prior consent of distributees would be "economically infeasible" and would put them out of business. Their distribution business it is emphasized must rely on heavy saturation distribution of these bags of advertising to be successful in direct competition with other media distribution of advertising such as the U. S. Mail or newspapers of general circulation which are exempt under this ordinance. The plaintiffs contend that this ordinance infringes on First Amendment rights of freedom of speech both for them, their advertising clients, as well as the distributees and recipients of the materials in violation of the Fourteenth Amendment Due Process Clause and First Amendment freedom of speech, and further that the

exemptions for deliveries by the United States Post Office and newspapers of general circulation violate the Equal Protection Clause of the Fourteenth Amendment.

The defendants contend that this ordinance is constitutional because it enforces legitimate goals of the Town of Rotterdam. They argue that bags are unsightly, a potential source of litter, present a security hazard, and a danger to children who might obtain the plastic bags or the samples within the bag and injure themselves. It is their position that the Town Board in the exercise of its proper legislative function enacted this challenged ordinance for these sound reasons in the interests of the Town and its residents.

In the light of pertinent decisions of the United States Supreme Court as well as other courts, including those of New York State discussed herein, the claims of the plaintiffs lack merit to support the serious constitutional violations allegedly caused by the regulatory terms of this town ordinance. Therefore, not only must the motion for a preliminary injunction be denied but also since there are no claims within the complaint which could form a basis for declaratory relief entailing federal constitutional violations, or for any other relief whatever, in my judgment, the complaint itself must be dismissed by this Court, sua sponte, for failure to state a federal claim upon which relief could be granted. *City of Kenosha v. Bruno*, 412 U.S. 507, 511 (1973); *Baker v. Carr*, 369 U.S. 186, 199 (1962); *Birnbaum v. Trussell*, 347 F.2d 86 (2d Cir. 1965); see *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939).

It is my judgment that this case is controlled by the decision of the United States Supreme Court in Breard v. Alexandria, 341 U.S. 622 (1951). The ordinance at issue in Breard contained the same generic requirement that solicitors obtain prior consent of the occupants of private residences before attempting to transact business with them. The characterization of this ordinance is essential to distinguish similar types of challenges to other ordinances which either license or prohibit the distribution of advertising or other materials. Ordinances which impose either a tax or licensing fee or which attempt to control or prohibit distribution by regulation present different, and often more difficult issues than the instant ordinance which does not purport to completely bar distribution to any willing recipient. Chrestensen v. Valentine, 122 F.2d 511, 514 (2d Cir. 1941), reversed on other grounds, 316 U.S. 52 (1942); see also, Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. New Jersey, 308 U.S. 147 (1939) (prohibiting handbilling); and Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 316 U.S. 584, reversed upon rehearing, 319 U.S. 103 (1943) (taxing by license on the distribution of handbills). The decision in Breard made this distinction in holding, based upon the precedent of Bunger v. Green River, 300 U.S. 638 (1937), that challenges based upon freedom of speech and due process do not rise to the level of a substantial federal question.

The Court said:

The opinions of this Court since this Green River case have not given any ground to argue that the police power of a state over soliciting has constitutional infirmities under the due process principle embodied in the concept of freedom to carry on an inoffensive trade or business The Green River ordinance can be characterized as prohibitory of appellant's legitimate business of obtaining subscriptions to periodicals only in the limited sense of forbidding solicitation of subscriptions by house-to-house canvass without invitation. All regulatory legislation is prohibitory in that sense. The usual methods of solicitation -- radio, periodicals, mail, local agencies -- are open. . . . we think that even a legitimate occupation may be restricted or prohibited in the public interest.

Breard v. Alexandria, *supra*, 341 U.S. at 631-633.

It has been settled law that a community or state, pursuant to its legitimate police powers:

may by general and non-discriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

The manner in which a community chooses to regulate those who wish to do business there, is certainly a matter for the local government. To what extent regulation is necessary and the reasons for such regulation are matters of legislative judgment not subject to judicial interference. *Valentine v. Chrestensen*, *supra*, 316 U.S. at

54; *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). And in any event, the control of such business is not within the ambit of the Constitution.

The precise extent to which the Town of Rotterdam could legislatively control the distribution of advertising materials need not be decided here. The holding of Breard is cast in terms of a generic ordinance requiring consent before the privacy and integrity of an abode is transgressed. Indeed, many towns and cities provide for special areas which are zoned for the very purposes of doing business in order to maintain the peace and order of residential areas. It is an ineludible conclusion that the ordinance challenged here is reasonably within the Fourteenth Amendment because its purposes go substantially beyond those approved by the Supreme Court in Breard allowing local government "to guard its citizens against the annoyances of life." It follows a fortiori that this ordinance in Rotterdam, which is designed not to prevent plaintiffs from canvassing house-to-house [see Breard, 341 U.S. at 650 (Black, J. dissenting)] for the requisite written consent, but merely to restrain them from delivering their wares without invitation, is equally constitutional within the broader and well recognized reasons given by the Town of Rotterdam. Plaintiffs admit that these bags are hung to saturate a given neighborhood, without regard to whether anyone will assume responsibility for them after delivery. The bags may be taken by

the presumed distributee; or if not, it is not difficult to envision their deterioration or scattering by wind, rain, sun or snow. Thus, the problem of littering is real and would pose difficult problems to the town. To wit, is the distributor at fault for introducing the litter of these bags and their contents into the neighborhood or is the resident responsible for not accepting responsibility for unsolicited appendages to his home? See *Schneider v. New Jersey*, supra, 308 U.S. at 163. Furthermore, the danger foreseen by the drafters of this ordinance, that the plastic bags or sample contents therein will find their way into the hands of children when they are so readily accessible and untended is a legitimate concern of local government and one unquestionably subject to legislative enactment to minimize it.

The security problem to residential homes, an ever growing problem in these times, is in the same category. The very presence of these materials in plain view upon a home or apartment door might very well publicly announce the absence of the occupant to the wrong kind of people, especially when they are delivered weekly or more frequently and allowed to gather. See *Martin v. Struthers*, 319 U.S. 141, 144 (1943).

Finally, aesthetics are also a well recognized concern of local and state government and may properly be the subject of the local police power. Such purposes were recently discussed by Mr. Justice Douglas in the context of a zoning ordinance:

The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas,
U.S. _____; 39 L. Ed. 797, 42 U.S. Law
Week 3213 (April 1, 1974).

Therefore, following the holding in Breard, I find that the due process challenge to the type of consent ordinance at issue here fails to state a substantial federal question.

Plaintiffs' remaining two challenges to this ordinance are that it violates their constitutional rights of freedom of speech and equal protection and are equally insubstantial in presenting federal questions.

The United States Supreme Court also addressed the validity of such a First Amendment challenge in Breard. The Court concluded that:

(i)t would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance.
Id. at 645.

While I recognize that in the Ad-Express business advertising is left on the residence rather than verbal solicitation, yet there is no constitutional distinction to be made here since both intrude upon the tranquility of the home. The effect of the ordinance is to provide community notice, as contrasted to an individual notice,

to solicitors or advertisers not to trespass to transact business without written consent. A city government may speak for its citizens on such matters and the freedoms in the First amendment do not bestow any rights to vendors to tell people what they do not want to hear. *Id.* at 643-44. Further support for this principle, as well as answer to plaintiffs' final challenge that the ordinance violates rights of equal protection of the law, is found in an eloquent decision by United States District Judge Yankwich in *Buxbom v. City of Riverside*, 29 F. Supp. 3 (S.D. Calif., C.D. 1939). That case involves practically an identical ordinance to the one challenged here, and which if anything is more restrictive in that it applies not only to advertising materials in residential areas but also to literature in public areas. Judge Yankwich answers fully the same arguments advanced by plaintiffs here. On the First Amendment claims he said:

If, as claimed by the petitioner, this curtails the right of the occupant of property to receive literature, and advertising, the answer is two-fold. The plaintiff, not being in the position, cannot complain of the invasion of rights which do not affect him.

More, the occupant of premises may have the full benefit of limitless distribution by indicating his consent directly to a particular distributor, or, generally, by placing upon his premises a sign indicating that "all distribution is welcome."

. . . Nor is any constitutional norm violated when he who would spread literature or advertising on private premises is compelled to obtain the owner's consent. A man's home is still his castle.

. . . it is incomprehensible how the right to print and distribute freely may be broadened into absolute freedom to invade another's property by littering his premises without his consent.

Buxbom v. City of Riverside, *supra*, 29 F. Supp. at 7; see also Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

The last challenge asserted by plaintiffs is that this ordinance by exempting newspapers of general circulation and the United States Post Office from its consent requirement denies them equal protection of the laws. In the first place, this challenge enters a vague and hypothetical area in that it is questionable whether in fact newspapers of general circulation or the United States Mail is delivered without consent. The important point however is that without consent, individuals or local governments have little authority under concepts of federal supremacy to regulate the United States Postal Service. See *Rockville Reminder, Inc. v. United States Postal Service*, 480 F. 2d 4 (2d Cir. 1973). But that is not to say that even here the appropriate legislative assembly, i.e., Congress, could not impose restrictions on the merits similar to those that the ordinance places on local deliveries of advertising. As the Supreme Court said in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970):

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of

what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality. . . . We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even

valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

Id. at 736-38 (citations omitted, emphasis supplied).

And the fact that plaintiffs may carry advertising for charitable organizations or other public service messages without charge or

at a nominal charge, does not diminish the right of a local government to preserve and protect the sanctity of the home even from unwanted "good" ideas. As the Supreme Court stated, such activities cannot be controlling in such a case because:

(i)f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

Valentine v. Chrestensen, *supra*, 316 U.S. at 55.

In terms of the exemption for newspapers of general circulation, the Town of Rotterdam may make reasonable classifications of materials delivered. The federal courts have traditionally drawn a distinction between primarily advertising materials and the communication of ideas as in the case of a newspaper. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 201 (1973) (Brennan, J. dissenting); *Valentine v. Chrestensen*, *supra*. There is no question that plaintiffs here distribute primarily advertising material which is entitled to no constitutional protection from governmental restraints such as the instant ordinance.

Therefore, in my judgment, the equal protection challenge also fails to state a substantial federal question. *Buxbom v. City of Riverside*, *supra*, 29 F. Supp. at 8.

The majority of plaintiffs' arguments are adequately addressed in the cases cited and discussed above. However, a final discussion of the recent decision of the United States District Court of New Jersey in Toms River Publishing Co. v. The Borough of Brielle, _____ F. Supp. _____, Civil Action No. 985-73 (March 1, 1974) is appropriate because its holding which declares a similar ordinance unconstitutional is heavily relied upon by the attorney for plaintiffs. I disagree respectfully with the decision of District Judge Fisher who relied on two cases primarily to hold the ordinance unconstitutional. That decision cites *Schneider v. New Jersey*, 308 U.S. 147 (1939), as do plaintiffs here, for the proposition that littering is not a valid justification for a consent ordinance. This interpretation, in my judgment, takes the Schneider holding completely out of the limited context of its facts because the type of ordinance there involved was a total ban upon distribution in public areas, not a consent delivery ordinance. The Supreme Court held that the potential for littering was not a valid reason to prohibit the distribution of printed matter to those who wanted it. In doing so, the decision did not condemn or withhold the power to control littering by local governments.

(w)e are of opinion that the purpose to keep streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it This constitutional protection does not deprive a city of all power to prevent littering.

Schneider v. New Jersey, supra, 308 U.S. at 162; see Wolin v. Port of New York Authority, 392 F.2d 83, 91 (2d Cir. 1968), cert. denied 393 U.S. 940 (1968); also see Martin v. Struthers, supra.

The ordinance in Schneider prohibited distribution even to those who might want the information; neither the instant ordinance nor the one in Toms River curtails the flow of information to a willing receiver. The other case primarily relied upon in Toms River is Lovell v. City of Griffin, 303 U.S. 444 (1938). This is also factually distinguishable because in Lovell, distribution to willing recipients was contingent upon obtaining a license to distribute, the issuance of which turned on an unconstitutionally overbroad discretion accorded to government officials. Again, neither the Rotterdam ordinance or the Toms River ordinance require a license or otherwise restrict the distribution of material to willing recipients. The Rotterdam ordinance can, in fact, be viewed as increasing governmental protection of the cherished, but rapidly vanishing, rights of privacy of all citizens and thus consistent with the decisions of Schneider and Lovell. The only discretion which affects the distribution of these materials under the Rotterdam ordinance is that conferred upon its citizens; none is vested in the government and thus the cases just discussed do not undermine the constitutionality of the instant ordinance. See Rowan v. United States Post Office Dept., supra, 397 U.S. at 737.

Therefore, relying upon the decisions cited herein, especially Breard and Buxbom, I find that this complaint fails to state a sub-

stantial federal claim upon which relief can be granted. Since the complaint must be dismissed, little discussion of the motion for a preliminary injunction is necessary except to point out that the required showing of irreparable harm made by the plaintiffs is very weak. To the extent that the main plaintiff, Ad-Express, Inc., claims that obtaining the householder's consent will cost more money, the Supreme Court has held that such expenses are "constitutionally immaterial" when measured against valid ordinances such as the instant one. *Breard v. Alexandria*, supra, 341 U.S. at 635 and 638. The claim by plaintiff, Penny Weber, that as an independent contractor delivering these advertising bags, she might lose her income of approximately \$60.00 per week, clearly fails to amount to irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 91-92 and 92 n. 68 (1974). And plaintiff, Andrew Gallo, as an advertising client of Ad-Express, Inc., who might have to advertise elsewhere or incur the proportional expenses of obtaining consent from the householders in Rotterdam, does not amount to any cognizable irreparable harm. *Breard v. Alexandria*, supra, 341 U.S. 631-32 and 638. The motion for preliminary injunction requires a showing of irreparable harm and likelihood of success in obtaining the declaratory judgment of constitutional violations, and neither requisite is evident here. See *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir. 1969), cert. den., 394 U.S. 999 (1969).

The New York State Court of Appeals has addressed similar

ordinances which require consent and found them constitutional.

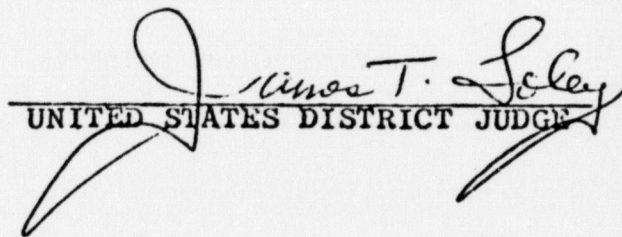
Watchtower Bible & T. Soc. v. Metropolitan Life Ins. Co., 297 N.Y. 339 (1948); see also People v. Bohnke, 287 N.Y. 154 (1941).

In conclusion, the motion for a preliminary injunction is denied and the complaint is dismissed sua sponte on the merits for failure to state a substantial federal claim upon which relief can be granted. The temporary restraining order which is still in effect by consent is vacated as of November 12, 1974 at 2:00 P.M. (Tuesday).

It is so Ordered.

Dated: November 5, 1974

Albany, New York


UNITED STATES DISTRICT JUDGE

United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 74-CV-401

AD-EXPRESS, INC.; REX KITCHEN, as President of AD-EXPRESS, INC.,
ANDREW GALLO, Individually and as President of ANDY GALLO
CONSTRUCTION COPR. d/b/a 4 SEASONS VARIETY STORE, and PENNY WEBER,
vs. Plaintiffs JUDGMENT

JOHN F. KRIVIN, Supervisor of the Town of Rotterdam, New York; BENJAMIN
WOLLNER, FRANCIS L. STONE, PETER LA MALFA, and WILLIAM OSTA, as members of
the Town Board of the Town of Rotterdam, New York; EDWARD LONGO and
JOHN LA MALFA, as Town Justices of the Town of Rotterdam, New York; and
JOSEPH S. DOMINELLI, as Chief of Police of the Town of Rotterdam, New York
Defendants

This action came on for ~~trial~~ (hearing) before the Court, Honorable James T. Foley

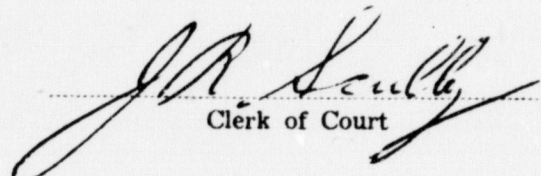
, United States District Judge, presiding, and the issues having been duly ~~tried~~
(heard) and a decision having been duly rendered,

It is Ordered and Adjudged

complaint is dismissed.

Dated at Utica, New York
November
of ~~October~~, 1974 .

, this 6th day


Clerk of Court

